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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1915

CITY OF CLEVELAND,

*Petitioner,*

*v.*

HONORABLE ROBERT B. KRUPANSKY, United States District Judge, and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The City of Cleveland petitions for a writ of certiorari to review the concurrent orders of the United States Court of Appeals for the Sixth Circuit dismissing petitions for writs of mandamus seeking (1) to require the district court to afford the City an opportunity to take depositions and have other essential discovery prior to the commencement of trial, and (2) to require District Judge Krupansky to disqualify himself under 28 U.S.C. § 455(a) because "his impartiality might reasonably be questioned" under all of the circumstances presented.

## OPINIONS BELOW

The *per curiam* opinions of the court of appeals, which are not yet reported, are set forth in Appendix A (discovery petition) and Appendix B (disqualification petition) (App. 1a and 12a, respectively). The district court's successive memorandum opinions allowing limited "paper" discovery in early 1976 and then denying each of the City's requests to allow further discovery and depositions, which are unreported, are set forth as Appendices E (App. 21a), F (App. 37a), G (App. 48a), H (App. 54a) and I (App. 58a). The district court's March 8, 1980 memorandum opinion denying the City's motion for disqualification, which is unreported, is set forth as Appendix J (App. 80a).

## JURISDICTION

The orders of the court of appeals dismissing the petitions for writs of mandamus were entered on March 25, 1980 (App. 1a, 12a). Petitioner's timely petitions for rehearing with suggestions for rehearing *en banc* with respect to each order were denied on May 6, 1980 (Appendices C and D, App. 19a and 20a, respectively). This Court has jurisdiction under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that pretrial supervisory mandamus is categorically unavailable either (a) to remedy a district court's total preclusion of deposition discovery and denial of other discovery essential to prosecution of a plaintiff's claim, or (b) to review the denial of a motion to disqualify a district judge.

2. Whether disqualification of a district judge for apparent lack of impartiality under 28 U.S.C. § 455(a), as newly added in 1974 to conform with Canon 3(C) of the Code of Judicial Conduct, depends—like disqualification for "*personal* bias or prejudice" under the traditional rule of 28 U.S.C. § 144 as in force since 1911—upon evidence of an "extrajudicial" nature, or whether the lack of impartiality may be established from the district judge's conduct and statements during the course of litigation.

## CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Fifth Amendment to the Constutition of the United States provides that "[n]o person shall * * * be deprived of * * * property, without due process of law."

2. 28 U.S.C. § 455(a), as added in 1974, provides that "[a]ny * * * judge * * * of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

3. Rule 26(b) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> "(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party * * *."

## STATEMENT

### A. Outline of The History Of The Litigation

The petitions for writs of mandamus dismissed by the court of appeals (which are the subject of the present petition) relate to an action for treble damages for violations of the Sherman Act pending in the United States District Court for the Northern District of Ohio, Eastern Division, under 15 U.S.C. §§ 15 and 26 and 28 U.S.C. § 1337. Honorable Robert B. Krupansky (one of the respondents here) has been the presiding judge since shortly after the complaint was filed on July 1, 1975. Plaintiff City of Cleveland (petitioner here) owns and operates a Municipal Electric Light Plant ("MELP"), which for many years has provided electrical service to a substantial portion of Cleveland in competition with defendant The Cleveland Electric Illuminating Company ("CEI," the other respondent here). CEI is a large privately owned utility whose facilities completely surround MELP's facilities and are essential for transmission of such electrical power as MELP needs to obtain from sources outside the Northeastern Ohio area. In brief, the complaint alleges that CEI has abused its monopoly power, with the objective of reducing and ultimately eliminating MELP, by refusing to establish an interconnection between CEI and MELP, by refusing to wheel power to MELP which was available from outside sources, and by other anticompetitive conduct designed to destroy MELP as a competitor and to take over its business. The City's complaint seeks damages in excess of $100,000,000.[1]

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[1] The complaint named four other utilities as co-conspirators and co-defendants (Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company and Toledo Edison

[footnote continued]

CEI's answer was filed on December 1, 1975, together with the first of a series of counterclaims against the City relating to charges for electric power sold by CEI to MELP under regulatory compulsion by the Federal Power Commission. Following unsuccessful negotiations that had preceded CEI's answer, the City moved on December 15, 1975 for disqualification of CEI's counsel for conflict of interest arising out of their prior legal services as bond counsel to the City. In January and February of 1976, the City filed initial document requests, interrogatories and requests for stipulations and admissions, some of which were responded to at that time together with similar discovery requests to the City by the defendants.

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Company). Each of these co-defendants has recently entered into a settlement with the City and has been dismissed.

The violations alleged in the complaint are similar to allegations by the Department of Justice and Commission staff in a proceeding before the Nuclear Regulatory Commission involving an application by a consortium consisting of CEI and the other defendants originally named in the complaint. In that proceeding, where the City was an intervenor, the full Commission has declined to review the finding of its Atomic Safety and Licensing Appeal Board under Section 105(c) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2135(c), that CEI and the other defendants created and maintained "a situation inconsistent with the antitrust laws." *In the Matter of the Toledo Edison Co. et al.*, 10 N.R.C. 265 (Appeal Board 1979), affirming with modifications 5 N.R.C. 133 (Atomic Safety and Licensing Board 1977); appeals from the Commission's final action are pending by Duquesne Light Company and Pennsylvania Power Company, 3d Cir. Nos. 80-1295, 1296, 1307 and 1310. The district court has declined to give any collateral estoppel effect to these administrative findings. *See* Memorandum and Order of January 15, 1980, included as Discovery Petition Ex. G, which we have lodged with the Clerk as explained at p. 9 and n.6, *infra*.

The attention of the parties and the district court was, however, soon occupied by court proceedings and discovery limited to the disqualification of counsel issue and CEI's counterclaims for payment. On March 1, 1976, the district court ordered an indefinite "moratorium * * * as to all new discovery proceedings." The motion for disqualification of CEI's counsel was denied on August 3, 1976, following evidentiary hearings, and summary judgment was entered on CEI's counterclaims on August 4, 1976 and February 24, 1977. The City appealed from those orders, and substantially all proceedings on the City's claim (including possible discovery) were stayed until those appeals were decided against the City in January and February 1978. 573 F.2d 1310, *cert. denied,* 435 U.S. 996 (disqualification of counsel); 570 F.2d 123 (counterclaims).[2]

Between the summer of 1976 and the fall of 1977 the parties also engaged in elaborate discussions looking toward a settlement of the entire litigation, which led to several postponements of the appellate proceedings. A settlement plan involving, *inter alia,* a transfer of MELP's business to CEI was on the verge of implementation when a change in the City administration occurred in November 1977. MELP's status and this litigation—which had aroused public controversy in Cleveland over a number of years—were a major issue in the 1977 mayoral election. The new administration rejected the proposed settlement and recommenced vigorous efforts

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[2]An order entered by the district court on September 21, 1976 provided that all proceedings were stayed pending appeal except that the Court "retains jurisdiction to promulgate additional orders to maintain the status quo and to ensure the enforcement of its previous orders * * * [and] to hear, consider and resolve all motions, including pending motions, *raising issues of law*" (emphasis added).

to prosecute the litigation as soon as the then pending proceedings in the Sixth Circuit were concluded.[3]

On February 22, 1978, the City (represented by new trial counsel) filed one of a series of motions for leave to take additional discovery beyond the preliminary "paper" discovery conducted in early 1976 prior to the discovery moratorium, which had continued in effect. The proceedings on those motions—all of which have been denied—are described in the next section of this Statement. The upshot has been that the City has been denied any further discovery and has, *inter alia*, been entirely precluded from any depositions on the merits of its antitrust claims in this litigation. Nonetheless, the district court on January 15, 1980, peremptorily fixed a firm trial date of March 10, 1980, which has been postponed only because of the mandamus proceedings here under review.[4]

Much of the record of this litigation has involved proceedings relating to the City's difficulties in making payment to CEI with respect to the charges for wholesale electricity which were the subject of CEI's counterclaims. These difficulties, which were ultimately resolved by the City's completion of payment on December 28, 1978, arose out of the widely publicized extreme financial distress from which the City has suffered in recent years. They led to a series of orders by Judge Krupansky in 1977 and 1978 directing the City Council to appropriate funds for payment of the counterclaim judgments, declining to relieve the City from CEI attachments of

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[3]On February 27, 1979, the citizens of Cleveland in a referendum vote rejected a proposal for sale of MELP to CEI.

[4]Stays pending the proceedings in this Court have been denied by the court of appeals and by Mr. Justice Stewart. The district court has subsequently scheduled the trial to commence on August 4, 1980.

MELP property, directing the City to show cause why it should not be held in contempt, finding the City in contempt and imposing fines.[5]

Following the district court's February 18, 1980 denial of the City's last discovery motion and the peremptory setting of the trial, the City reluctantly came to the conclusion that—in the light of all of Judge Krupansky's actions and statements throughout the life of the case—the City could not have a fair and impartial trial unless Judge Krupansky recused himself. Accordingly, the City moved to disqualify under 28 U.S.C. § 455(a). This motion was denied on March 8, 1980. The discovery and disqualification mandamus petitions were filed in the Court of Appeals immediately following Judge Krupansky's adverse decisions on each point.

### B. The City's Mandamus Petitions

Because of the nature of the issues they presented, the City's mandamus petitions necessarily contained lengthy statements of fact showing (1) the history of the City's discovery efforts and Judge Krupansky's rebuffs to those efforts, and (2) that the judicial impartiality guaranteed by 28 U.S.C. § 455(a) and by due process may reasonably be questioned. They were also accompanied by exhibit volumes containing portions of the district court record, the City's several detailed motions pleading for discovery, the affidavits supporting the motion for disqualification and the numerous pertinent opinions by Judge Krupansky. While those facts and exhibits are

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[5] *See* Petition for Writ of Mandamus to Compel Disqualification at pp. 31-37 and Exhibits A-4, A-5 (¶¶ 21-25), 19.5-24, 29, 30 and 32-36 thereto.

equally pertinent here for demonstrating the egregious nature of the district court proceedings and the impropriety of the court of appeals' refusal to exercise its supervisory powers, it is not feasible to set them forth within the appropriate confines of a petition for a writ of certiorari. We have, accordingly, lodged with the Clerk copies of each of the mandamus petitions and the exhibits thereto.[6] Fearful though we are that a mere summary will fail to convey the enormity of the injustice that the City would suffer in a trial before Judge Krupansky with only the rudimentary discovery he has allowed, we have no option other than to limit this Statement to such a summary.

### 1. *The petition seeking depositions and other essential discovery.*

The discovery mandamus petition, submitted eleven days after the district court's denial of the City's final effort to obtain discovery, recounted the history of the City's efforts to obtain adequate discovery with respect to the issues of antitrust violation, impact and damages; it was accompanied by copies of the City's motions to the district court showing in detail its need for discovery. The petition pointed out that the only merits discovery permitted to the City in the case was during the seven-week period in early 1976 immediately following the answers to the complaint, that such discovery was limited to a first "wave" of interrogatories, document requests and requests for admissions, that the City has not been permitted to take a single deposition on the merits in

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[6] We refer to the mandamus petitions hereafter as "Discovery Petition" and "Disqualification Petition." We have also lodged a copy of the City's Motion for Leave to Submit Additional Exhibits in support of the Disqualification Petition; this motion was not ruled upon by the court of appeals.

this action, and that the district court has refused each of the City's several requests to lift the moratorium on discovery decreed on March 1, 1976.

The district court's consistently negative approach to the City's discovery efforts was foreshadowed in its memorandum opinion of January 23, 1976, less than sixty days after CEI's answer to the complaint and seven days *before* the answers of two other defendants (Appendix E, App. 21a). That opinion referred to a "boilerplate" order entered on August 25, 1975, providing that "[a]ll discovery, including depositions and medical examinations, shall be completed within 120 days, or extension thereof, after service of the complaint" (App. 25a; *see* Disqualification Petition Ex. 3). It took the position that "[p]ursuant to the above Pre-Trial Order all discovery closed on November 14, 1975" (App. 25a) before any answers had been filed, and reiterated the court's January 12 order scheduling the trial to begin on March 1 (App. 27a), only thirty days after the last answer to the complaint was due, with five to seven weeks of trial time allocated. The court then chastised the City for having filed discovery requests in early January:

> "The City's failure to initiate and pursue any discovery whatsoever for a period of six and one-half months and, suddenly, 53 days before trial, for the first time serve the defendants with Requests for Answers to Interrogatories does not reflect well upon the City's sincerity and intention to undertake discovery in this case in good faith." [App. 30a]

While the January 23, 1976 order did permit discovery to continue during the five weeks remaining before the March 1 trial date, it expressed the proposition that the City had already had adequate discovery and trial

preparation through its participation as intervenor in administrative proceedings before the Nuclear Regulatory Commission (*see* p. 4 n.1, *supra*) and its earlier complaint to the Federal Power Commission successfully seeking an order requiring CEI to sell power to MELP (App. 32a-34a). This proposition was answered both in the City's discovery mandamus petition and in its other discovery motions to the district court, which pointed out (1) that there had been no antitrust discovery in the FPC proceeding; (2) that the main protagonists in the NRC proceeding were the Commission staff and the Department of Justice, not the City; (3) that the question whether a nuclear power plant proposal would be anticompetitive did not include such questions of liability under Section 4 of the Clayton Act as effects on retail competition and damages suffered by MELP; and (4) that since the NRC evidentiary proceedings closed in 1976, they provided no information about relevant events in recent years (Discovery Petition pp. 20-21 and Ex. C pp. 14-15; Ex. E pp. 5-7; Ex. H pp. 22-24).[7]

On February 14, 1976, the district court denied the City's motion for an extension of the discovery period, substantially reiterating its January 23 statements and expressing the opinion that the City's initial discovery efforts

> "manifest plaintiff's entrance upon a deliberate course of harassment and pursuit of dilatory tactics, calculated to overburden the defendants to this action and designed to frustrate the Court

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[7]The City has, of course, made substantial use of documents and testimony from the NRC proceedings and has not sought duplicate discovery in this action. *See, e.g.*, Discovery Petition Ex. E pp. 5-6.

in providing the parties with a speedy trial." [Appendix F, App. 44a].

While the court thereafter postponed the trial because of settlement discussions and for various other successive reasons, it continued the March 1, 1976 discovery "moratorium" (Discovery Petition Ex. A) and has consistently refused to lift it.

On February 22, 1978, immediately after the end of the hiatus caused by appellate proceedings on disqualification of counsel and counterclaims and also promptly after the electoral termination of the intervening settlement discussions, the City's new trial counsel filed a motion to lift the moratorium and to permit depositions and other further discovery (Discovery Petition Ex. C). After a six-month delay—during which discovery could have been conducted without the slightest disruption—the court denied the motion on September 7, 1978, on the same grounds it had stated in 1976,[8] subject only to a provision that the City might apply further for leave to take "additional limited discovery" if it could show "unusual circumstances." The September 1978 order required that any such application meet the following extraordinary conditions: (1) all outstanding discovery requests directed to the City must first be satisfied; (2) "clear and convincing evidence" must show in advance that particularized information would be "vital to the proceeding" and was not available from any other source; and (3) all costs of providing such further discovery—

[8]The statement in the memorandum opinion that the court of appeals had "recognized * * * the broad latitude and extensive discovery accorded to the plaintiff during the protracted history of these proceedings" (App. 51a) is misleading at best. The unreported opinion cited by Judge Krupansky (a copy of which appears in Disqualification Petition Ex. 24.5) referred only to discovery on the limited question of disqualification of counsel.

*including attorneys' fees for the adverse party*—must be deposited with the Court in cash, so that they could be paid to the adverse party upon completion of its response (Appendix G, App. 52a-53a).

On January 2, 1979, the City filed a further application for specified limited discovery (Discovery Petition Ex. E), making a detailed showing of need but protesting the financial requirements of the September 1978 order. Judge Krupansky dealt with that motion orally on January 27, 1979 (Discovery Petition Ex. F), denying "out of hand" the request for depositions (*id.* pp. 9-10), concluding that "further discovery may be justifiably foreclosed in this action" (*id.* pp. 51-52), and providing that the City "will be notified as to the dates when we will permit the City to attempt to support its presently-unsupported allegations" of need (*id.* p. 54); Judge Krupansky further stated that "[t]his case, at this point in time, goes to the bottom of my docket" (*id.* p. 53). Reconsideration of the January 27 oral denial of discovery was denied on February 7, 1979 (Appendix H, App. 54a). Subsequent orders by the district court required the City to provide detailed damage calculations in response to defendants' prior discovery requests and thereby precluded the City from initiating further discovery requests under the September 1978 criteria until it was able to complete those calculations in November 1979 (*see* Discovery Petition p. 4 and Disqualification Petition p. 40). By that time, the Nuclear Regulatory Commission had decided issues of fact identical to some of the issues of fact before the district court (*see* p. 4 n.1, *supra*). Accordingly, on October 26, 1979, the City moved that the district court find concluded, for purposes of the litigation, such final factual adjudications made in a proceeding involving

all of the same parties. The district court denied the motion on January 15, 1980.[9]

On January 16, 1980, the City filed a detailed "Revised and Supplemented Application for Limited Discovery" (Discovery Petition Ex. H), including proposed interrogatories, document requests and a deposition list and explaining the need for each in light of the limited paper discovery at the outset of the case in 1976 and the information derivable from the related administrative proceedings.[10] That final application was categorically denied in its entirety by Judge Krupansky's February 18, 1980 order, which reiterated the litany of justifications for denial of discovery first formulated in 1976 (Appendix I, App. 58a).

This discovery mandamus petition contended that the City is being denied its rights under the Federal Rules of Civil Procedure, as well as due process, by being compelled to present its antitrust claims with not a single deposition on the merits and only preliminary paper

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[9]This ruling, of which the court of appeals was apparently not aware (*see* App. 6a), eliminated the City's hope of avoiding the need for discovery on certain matters (*see* Disqualification Petition p. 41). The district court's memorandum opinion denying collateral estoppel effect took a different tack from the district court's repeated statements that all necessary discovery had been provided by the NRC proceedings, now asserting that the NRC's "statutory mandates * * * differ substantially and materially from that of a tribunal presiding over a civil antitrust action" (Discovery Petition Ex. G p. 8 n.3).

[10]In preparing its "Revised and Supplemented Application for Limited Discovery" the City's counsel had availed themselves of the breathing space apparently afforded by the district court's announcement that the case was at "the bottom of my docket." As it happened, the City's detailed motion was not ready for filing until the day after the district court's surprise announcement that the trial would commence on March 10, 1980.

discovery in this case. In response to the petition, Judge Krupansky addressed an *ex parte* letter to the court of appeals accusing the City of dilatory tactics and defending his orders. Counsel for the City were not served with a copy of this letter and were unaware of its existence until they received the court of appeals opinion, which attached and relied upon it (Appendix A Ex. A, App. 9a). Apart from its obvious impropriety, Judge Krupansky's *ex parte* letter significantly misstates the record in asserting that in January 1979 "this trial court granted the City's * * * motion to pursue discovery" (App. 9a). In fact, the January 1979 oral ruling denied "out of hand" the City's request for depositions and stated no more than that the City would be given an opportunity "to factually support its allegations for the need for discovery" at some future date, subject, however, to the extraordinary prerequisites of the September 1978 order (*see* pp. 12-13, *supra*; Discovery Petition Ex. F pp. 52, 54). As we have shown, no discovery whatsoever has been allowed the City since the preliminary "paper discovery" requests permitted in January and February 1976. Judge Krupansky's letter to the court of appeals also disparages the City's pursuit of the litigation as an "endeavor to involve the Court in perpetuating an emotional, politically controversial issue" (App. 10a).

2. *The petition seeking disqualification of Judge Krupansky for lack of impartiality.*

The disqualification mandamus petition sought review of Judge Krupansky's March 8, 1980 denial of the Motion for Disqualification which the City had filed immediately after the final denial of discovery. Like the motion, the mandamus petition was based upon

28 U.S.C. § 455(a), which had been added in 1974 to require a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned"; while the motion and petition also contended that disqualification is required to assure constitutional due process, they eschewed any reliance on the traditional "personal bias or prejudice" standard for disqualification that had long been (and continues to be) embodied in 28 U.S.C. § 144.[11] Judge Krupansky's opinion (Appendix J, App. 80a) nonetheless treated the motion as if it were governed by the standards of § 144, holding that the two sections "must be construed *in pari materia*" (App. 86a). Judge Krupansky noted that "plaintiff's moving papers are entirely devoid of specific factual allegations which even suggest, much less demonstrate, that the Court's alleged partiality emanates from

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[11] Section 144, which was first enacted as § 21 of the 1911 Judicial Code, provides as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Unlike § 455(a), § 144 is a relatively technical provision. *Inter alia*, it has long been established that "personal bias or prejudice" must have been derived from an extrajudicial source. *E.g., United States v. Grinnell Corp.*, 384 U.S. 563, 583. Because the City was unable to specify any extrajudicial source for Judge Krupansky's hostility to its case, it deliberately eschewed reliance on § 144.

an extrajudicial source" (App. 93a). He concluded, accordingly, that

> "Accepting, *arguendo,* as true the plaintiff's charges * * * that this Court has, to the plaintiff's detriment, mismanaged pretrial discovery; and that this tribunal's courtroom demeanor, as evidenced solely in the course of judicial proceedings undertaken herein, has reflected a lack of impartiality, this Court cannot, consistent with the governing authorities, find these charges [legally sufficient to warrant disqualification]."
>
> [App. 93a-95a, footnote omitted.]

Judge Krupansky further held that the motion was untimely since "a significant portion of the events underlying the plaintiff's current charge of partiality transpired at a relatively early stage of this protracted proceeding, and * * * ensuing incidents in the years 1977, 1978, and early 1979 reinforced the City's impression that this forum lacked impartiality" (App. 105a-106a).

The disqualification mandamus petition, which was accompanied by three volumes of exhibits, began with a lengthy recital of pertinent events in the history of the litigation, based upon the record itself and the affidavits and other materials that had been submitted with the motion. The affidavits (Disqualification Petition Exhibits A-1 through A-8) came from five lawyers from three different law firms that had represented the City in connection with the litigation, from two former City law directors of opposite political parties and from two reporters who had covered the proceedings in the case for *The Cleveland Plain Dealer*; each expressed, and documented, a considered opinion that Judge Krupansky's impartiality could (at the least) reasonably

be questioned. In addition, the City had submitted a copy of an editorial published in *The Cleveland Press* of March 3, 1980, reviewing the circumstances of the case and expressing the opinion that "many Greater Clevelanders have come to believe that the judge has some bias against the city's position in the case" and that Judge Krupansky "should step aside and let another judge try [the case]." (Disqualification Petition Ex. B-1)

The evidence of lack of impartiality summarized in the petition included, *inter alia*, the sequence of orders in which Judge Krupansky had studiously deprived the City of essential liability discovery and substantially all damage discovery (Disqualification Petition pp. 37-43; *see* pp. 9-15, *supra*). The petition also described the pattern of precipitate trial schedulings and postponements which have appeared to be calculated to hamper orderly preparation of the City's case and to force settlement on CEI's terms (Disqualification Petition pp. 44-46), as well as the extraordinary history of mandatory orders and subpoenas to City officials, contempt proceedings, denials of motions to substitute security and defer execution of liens, and threats of dismissal of the antitrust claim which occurred in connection with the City's attempts, in a time of near-bankruptcy, to satisfy the judgments entered on CEI's counterclaims; here again, the facts set forth in the mandamus petition (at pp. 31-37) suggest a judicial campaign to force the City to accede to a transfer of MELP's assets to CEI in fulfillment of CEI's longstanding predatory business goal.

It is impossible to describe this evidence adequately in this petition or to set forth the further evidence, detailed in the mandamus petition, showing partiality and abuse of the judicial process to undermine the City's prosecution of its claim (Disqualification Petition

pp. 29-31 and 47-60; *see also* pp. 9-26).[12] Nor is it necessary to do so in view of the grounds of the disqualification rulings below and the nature of the issues presented for certiorari. The court of appeals held that the disqualification issue was inappropriate for consideration on a pretrial mandamus petition, and alternatively agreed with the district court that such evidence could not require disqualification because it was not "extrajudicial" in nature (*see* pp. 21-22, *infra*). The issue presented for review in this Court is whether such refusal to consider the evidence at all was erroneous as a matter of law. It suffices for purposes of this petition to note that the City presented an unusually serious and well-documented issue of judicial partiality that could not appropriately be deemed either insubstantial or dilatory; indeed, the court of appeals did not so characterize it and dismissed the mandamus petition on solely legal grounds.

The disqualification mandamus petition discussed the 1974 change in the disqualification statutes in detail, pointing to legislative history showing that the new § 455(a) was intended, as its language itself indicates, (1) to eliminate the "duty to sit" doctrine earlier followed by some courts, (2) to broaden the grounds for disqualification by emphasizing the need for assuring the *appearance* of impartiality, and (3) to permit disqualification to be based on evidence drawn from the conduct of the proceedings themselves (as distinguished from the "extrajudicial" evidence requirement applied under

[12]Among other things, the petition described a published interview given by the Judge to a Cleveland newspaper in which he disparaged the City's case as "boring." *See* Disqualification Petition pp. 59-60. Apart from the disparagement, such a public statement about a pending case violates Canon 3(A)(6) of the Code of Judicial Conduct.

§ 144). (*See* Disqualification Petition pp. 76-91.) The petition further showed that no claim of untimeliness could properly be made under all of the circumstances, since § 455(a) includes no deadline for filing and the City could not reasonably be expected to challenge Judge Krupansky's qualifications until it had exhausted all possible remedies that he might reasonably grant. (*See* Disqualification Petition pp. 66-72, citing, *e.g.*, *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977); *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1115 (5th Cir. 1980), *petition for certiorari pending* (No. 79-1522).)[13]

### C. The Decisions Of The Court Of Appeals Dismissing The Petitions

A single panel of the court of appeals dismissed both the discovery mandamus petition and the disqualification mandamus petition in separate *per curiam* opinions issued on the same day.

With respect to the discovery petition, the court of appeals—referring to the various orders entered in the district court and Judge Krupansky's *ex parte* letter to the court of appeals—framed the issue before it as follows:

> "[T]he Judge is contending that the City has been allowed ample discovery over a period of years

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[13]As with the discovery petition, Judge Krupansky submitted a personal response to the disqualification petition, but this was not made available to the City until three days after the panel decision. This consisted of a seventeen-page "Memorandum of Respondent Robert B. Krupansky in Opposition to Motion for Writ of Mandamus to Compel Disqualification" and a factual affidavit by one of his former law clerks. We have lodged a copy of this unusual document with the Clerk.

> and it did not always avail itself of the opportunity to obtain discovery and used the device of asking for additional discovery as a ruse to obtain numerous continuances, delay the trial, harass the defendants and subject them to unconscionable expense; that the City has not shown the necessity for any additional discovery in order to warrant any further postponements of the trial. The City denies all of this but we cannot determine these issues in a mandamus proceeding. They can only be determined in a direct appeal from a judgment entered in the antitrust case."
>
> [Appendix A, App. 6a]

The court of appeals held categorically that "[t]he District Court has broad discretion in handling pretrial discovery matters and they are not reviewable in a mandamus action" (App. 7a).[14]

With respect to the disqualification petition, the court of appeals similarly held that mandamus was not available, categorically stating that "mandamus [is] not the proper remedy to compel a judge to recuse himself" (Attachment B, App. 16a) and that "[t]he order entered by a District Judge refusing to disqualify himself is not reviewable upon appeal until a final judgment has been entered in the case" (App. 16a). Additionally the court of appeals expressed its agreement with the district court

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[14] While the opinion further contains an unexplained sentence stating that "[w]e are unable to find any abuse of discretion on the part of the Judge in his discovery orders entered in the antitrust case or in his order assigning the case for trial" (App. 7a), this statement is inconsistent with the court's more fully articulated refusal to examine the issue and does not indicate that the court engaged in the plenary review requested by the petition, the availability of which on mandamus (as distinguished from awaiting appeal from a final judgment) is the question presented here with respect to the discovery petition.

that 28 U.S.C. § 144 (enacted in 1911) and new 28 U.S.C. § 455(a) (enacted in 1974) "must be construed *in pari materia*" (App. 14a), with the result that "disqualification under Section 455(a) must be predicated as previously under Section 144, upon extrajudicial conduct rather than on judicial conduct" (App. 15a). Since the evidence of lack of impartiality presented by the City "could have and undoubtedly did occur in judicial proceedings" (App. 13a), the court of appeals agreed with the district court that it should not be considered. Although noting the district court's finding of untimeliness (App. 15a) and the City's responsive explanation of the timing of its motion (App. 14a) and observing in passing that "[i]t does seem to us that the City waited until a long time in order to discover that the Judge was biased" (App. 13a), the court of appeals made no holding as to timeliness. Accordingly, the correctness of its decision depends entirely upon the alternative questions as to the availability of pretrial mandamus to consider disqualification and as to the applicability of the § 144 "extrajudicial source" rule to disqualification under § 455(a).

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISIONS BELOW CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE AVAILABILITY OF PRETRIAL SUPERVISORY MANDAMUS IN SIMILAR CIRCUMSTANCES

#### A. As To Pretrial Review Of A Denial Of A Motion To Disqualify The Trial Judge.

The court of appeals' categorical holding that "mandamus [is] not the proper remedy to compel a judge to recuse himself" (App. 16a) conflicts starkly with the holdings of other courts of appeals. Most recently, *In re: International Business Machines Corp.*, 2d Cir. No. 79-3070 (February 25, 1980), has rejected precisely the rationale upon which the court below determined that mandamus was inappropriate, holding that "[w]e do not agree" that a district court's findings on a disqualification motion "are discretionary and therefore preclude the writ" (slip op. pp. 1414-1415). The Second Circuit reiterated that

> "This court has long since taken the position that there are 'few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself.' *Rosen v. Sugarman,* 357 F.2d 794, 797 (1966). We do not read [*Will v.*] *Calvert Fire Insurance Co.* [437 U.S. 655,] to overrule *sub silentio* this well established rule, followed by a great majority of other circuits as well. [Footnote citing cases omitted.] A claim of personal bias and prejudice strikes at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring

> it should itself terminate the inquiry until an ultimate appeal on the merits."
>
> [Slip op. pp. 1415-1416.]

Similarly, the Seventh Circuit, while noting that "[t]raditionally we have been extremely reluctant to make use of the extraordinary remedy of mandamus against a district judge," has recently held that pretrial mandamus is the appropriate means of review of a district judge's refusal to disqualify himself under 28 U.S.C. § 455(a). *SCA Services, Inc. v. Morgan,* 557 F.2d 110, 117 (7th Cir. 1977). To the same effect *see, e.g., Pfizer Inc. v. Lord,* 456 F.2d 532, 536-537 (8th Cir. 1972), *cert. denied,* 406 U.S. 976; *In re Union Leader Corp.,* 292 F.2d 381, 383-384 (1st Cir. 1961), *cert. denied,* 368 U.S. 927. This conflict among the Circuits plainly involves a question of continuing importance in the administration of justice.

### B. As To Pretrial Review Of A Denial Of Fundamental Discovery.

In *Western Electric Co. v. Stern,* 544 F.2d 1196 (3d Cir. 1976), mandamus was granted to remedy "[t]he district court's refusal to grant Western any discovery of plaintiff's assertions as to the nature of Western's discrimination against individual members of the class * * *." While recognizing the limits upon supervisory mandamus, the Third Circuit held that such a denial of fundamental discovery "was clearly in excess of the [district court's] powers under the Federal Rules of Civil Procedure" and therefore "relief under the All Writs Act is appropriate to enable Western to present a full defense at the general liability stage of the trial * * *." 554 F.2d at 1198-1199. Similarly, mandamus was granted in *Investment Properties International, Ltd. v. IOS,*

*Ltd.*, 459 F.2d 705 (2d Cir. 1972), to vacate an order precluding plaintiffs from deposing defendants' officers with respect to threshold issues of jurisdiction and standing. The Second Circuit held that an extraordinary situation warranting supervisory mandamus was presented because

> "Discovery here * * * is not a matter of mere 'housekeeping,' * * * but is the heart of the controversy, for on it turns plaintiffs-petitioners' right to be in court. The order below makes it virtually impossible to discover the facts on which jurisdiction and standing turn, and thus puts the plaintiffs-petitioners in a cul-de-sac which the Federal Rules never contemplated." 459 F.2d at 707.

The situation in this case is equally grave, since the district court has entirely precluded the City from antitrust deposition discovery in this action and has limited the City's paper discovery to a first "wave" conducted in early 1976. Thus, the City lacks any discovery relating to the events of the last four and one-half years and has had substantially no discovery on matters relating to the retail market in which CEI competes with the City or to damage questions; moreover, the City has been precluded from the refinement of discovery through successive waves that is normal in cases of such complexity. Under these circumstances, the court of appeals' refusal to consider the matter on mandamus not only perpetuates an extraordinary injustice,[15] but also conflicts directly with the rule of

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[15]Accordingly, the present petition also raises the question whether the court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

supervisory mandamus followed by the Second and Third Circuits. *See also Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 523-526 (D.C. Cir. 1974).

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In addition to conflicting with the decisions of other courts of appeals, the Sixth Circuit's categorical refusal to consider the disqualification and denial-of-discovery questions on pretrial mandamus conflicts in principle with this Court's approval of supervisory mandamus in similar circumstances where the integrity of the trial proceedings was at stake. In *La Buy v. Howes Leather Co.*, 352 U.S. 249, this Court endorsed the use of mandamus to prevent the district judge from making an improper reference of antitrust cases for trial before a master. Notwithstanding its agreement that the question could be reviewed on appeal after judgment, this Court found no doubt of the existence of mandamus power or of the appropriateness of its exercise before trial in a situation where there is a serious question under the Federal Rules of Civil Procedure relating to proper conduct of a trial (352 U.S. at 256). Here, as there, "the rules have been practically nullified by a District Judge" and the Court should "not hesitate to restrain [him]" (*ibid.*). Similarly, the Court found pretrial mandamus appropriate to preserve the right to a properly ordered jury trial in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, although there as well the right could have been vindicated by a post-judgment appeal. As in those cases, both the discovery and disqualification petitions have sought to protect the integrity of the trial proceedings, by requiring access to essential preparatory discovery and by assuring the presence of an impartial judge.

## II.

## THE COURT OF APPEALS' ALTERNATIVE HOLDING THAT A JUDGE MAY BE DISQUALIFIED UNDER NEW § 455(a) ONLY UPON A SHOWING OF BIAS DERIVED FROM AN "EXTRAJUDICIAL SOURCE" RAISES AN IMPORTANT QUESTION THAT SHOULD BE SETTLED BY THIS COURT AND IS INCONSISTENT WITH THE PRINCIPLE FOLLOWED BY OTHER CIRCUITS

Prior to 1974, disqualification of federal judges (other than voluntary disqualification or disqualification for specified financial or other interests under the former version of 28 U.S.C. § 455) was governed by 28 U.S.C. § 144. That section, which was enacted in 1911 and remains in force, requires disqualification upon the filing of a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice" (*see* p. 16 n.11, *supra*). It has long been established that such "*personal* bias or prejudice" must derive from an extrajudicial source, *see United States v. Grinnell Corp.*, 384 U.S. 563, and that no inquiry is to be made into the truth of the charge of "personal bias or prejudice" so long as it is asserted in a legally sufficient affidavit, *Berger v. United States*, 255 U.S. 22. (As we have noted, the City's effort to disqualify Judge Krupansky was *not* based upon § 144.)

In 1974, following the adoption by the Judicial Conference of the United States of the new Code of Judicial Conduct developed by the American Bar Association, Congress enacted a completely revised version of 28 U.S.C. § 455. This revision was designed to "broaden and clarify the grounds for judicial disqualification" (H.R. Rep. No. 1453, 93d Cong. 2d Sess., p. 1) and to harmonize the statute with the new Code (*id.* pp. 1-2).

Section 455(a)—upon which the City's effort to disqualify Judge Krupansky is based—was entirely new and was drawn verbatim from Canon 3(C)(1) of the Code. This new requirement of disqualification "in any proceeding in which [the judge's] impartiality might reasonably be questioned" was described as a "general, or catch-all, provision," with the following purpose:

> "This sets up an objective standard * * *. This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case. The language also has the effect of removing the so-called 'duty to sit' which has become a gloss on the existing statute. *See Edwards v. United States* (5th Cir. 1964), 334 Fed. 360. Under the interpretation set forth in the *Edwards* case, a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a 'duty to sit'. Such a concept has been criticized by legal writers and witnesses at the hearings were unanimously of the opinion that elimination of this 'duty to sit' would enhance public confidence in the impartiality of the judicial system." H.R. Rep. No. 1453, 93d Cong. 2d Sess., p. 5.[16]

There has been no finding in this case that the facts set forth in the City's disqualification motion and petition are not true or that they do not provide "a reasonable factual basis for doubting the judge's impartiality." Judge Krupansky's opinion assumed as much "arguendo" (p. 17, *supra*), resting his denial of the motion entirely—

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[16]The Senate Report on the bill contains the identical language. S. Rep. No. 419, 93d Cong. 1st Sess., p. 5.

apart from the question of timeliness—upon the proposition that such a lack of impartiality is legally insufficient unless it "emanates from an extrajudicial source" (*ibid.*). The court of Appeals—which did not hold the motion untimely[17]—based its alternative discussion of the merits of the disqualification issue on the same proposition. Accordingly, the question here is a simple question of law: whether the new "general, or catch-all" disqualification provision introduced in 1974 implicitly carried forward the "extrajudicial source" gloss that had been placed upon the use of the adjective "personal" in § 144. If that question was answered correctly below, new § 455(a) would add nothing whatever to § 144; rather, the new section would be even harder to satisfy than § 144, since it does not include the procedural advantage of § 144's preclusion of any inquiry into the facts asserted in a legally sufficient affidavit.[18]

Plainly this is a critical question that should be settled by this Court, which has never construed the new § 455(a). It is true that the interpretation of § 455(a) below relied upon one aspect of the Second Circuit's recent decision in *In re: International Business Machines*

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[17]As noted at p. 20, *supra*, the question of timeliness was fully answered in the disqualification mandamus petition. Since it is not in issue here, we do not discuss it further.

[18]That § 455(a) was intended to add a new standard for disqualification is also apparent from the fact that it is immediately followed in the amended statute by a reiteration of the § 144 "personal bias or prejudice" standard (§ 455(b)(1)), following the general format of Canon 3 of the Code of Judicial Conduct. If the "appearance of impartiality" standard were not broader than the "personal bias or prejudice" standard, there would have been no reason for Congress or the draftsmen of the Code to put them side by side.

*Corp., supra,* and agrees with decisions of the Fifth Circuit.[19] It is, however, inconsistent with the reasoning of the First Circuit in *Blizard v. Frechette,* 601 F.2d 1217, 1220 (1st Cir. 1979), and *United States v. Cepeda Penes,* 577 F.2d 754 (1st Cir. 1978):

> "We recognize that the newly amended recusal provision, 28 U.S.C. § 455(a), now *permits* disqualification of judges even if alleged prejudice is a result of *judicially* acquired information, in contradistinction to the prior law that *required* a judge to hear a case unless he had developed preconceptions by means of extrajudicial sources. The rationale for the amendments to the statute * * * was 'to foster public confidence in the judicial system' by requiring disqualification based on 'a reasonable factual basis for doubting the judge's impartiality.'" 577 F.2d at 758.

The "extrajudicial source" requirement imposed below is also inconsistent with the holding in *Rice v. McKenzie,* 581 F.2d 1114 (4th Cir. 1978), that § 455(a) precluded a newly appointed federal judge from reviewing a case on which he had previously sat as a state judge, notwithstanding the fact that his prior involvement was not "extrajudicial." The Fourth Circuit articulated the standard as follows:

> "Congress was concerned with the appearance of impartiality to the general public. Neither our faith nor the imaginings of one highly suspicious

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[19] *In re Corrugated Container Antitrust Litigation,* 614 F.2d 958 (5th Cir. 1980); *Davis v. Board of School Commissioners,* 517 F.2d 1044 (5th Cir. 1975), *cert. denied,* 425 U.S. 944; *but see Potashnick v. Port City Construction Co., supra,* 609 F.2d at 1111; *Parrish v. Board of Commissioners of Alabama State Bar,* 524 F.2d 98, 103 (5th Cir. 1975), *cert. denied,* 425 U.S. 944. *See also United States v. Haldeman,* 559 F.2d 31, 132 n.297 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (dictum).

of others are relevant. The inquiry begins and ends with a determination whether a reasonable person would have had a reasonable basis for doubting the judge's impartiality." 581 F.2d at 1117.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 5, 1980

# APPENDIX

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 80-3146

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[Decided and Filed: March 25, 1980]

CITY OF CLEVELAND,
*Plaintiff-Petitioner,*

*v.*

HONORABLE ROBERT B. KRUPANSKY,
United States District Judge for the Northern District of Ohio Eastern Division

and

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
*Respondents.*

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION**

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Before Weick, Circuit Judge and Phillips and Peck, Senior Circuit Judges.

PER CURIAM. This is a Petition for a Writ of Mandamus filed by the City of Cleveland (City) against Honorable Robert B. Krupansky, United States District Judge for Northern Ohio, Eastern Division (Judge), and The Cleveland Electric Illuminating Company (CEI), which

relates to a complex antitrust action pending before the Judge since July 1, 1975, and known as *City of Cleveland v. The Cleveland Electric Illuminating Company,* Civil Action No. C75-560, and seeks an order from this court requiring the Judge "to cease his unlawful abuse of judicial power and to permit the City discovery in accordance with the Federal Rules of Civil Procedure."

The City owned and operated a Municipal Electric Light Plant and purchased electricity from CEI for sale to its customers. The antitrust action arose out of this relationship.

The City filed a motion in this court for a stay of all proceedings in the antitrust action pending the determination by this court of this mandamus petition.

The City filed a motion in the District Court seeking to require the Judge to disqualify himself.

The District Court in Northern Ohio is located in a large industrial area and has a congested docket. The Judge did not engage counsel to defend himself. Instead, he wrote a letter to our clerk dated March 3, 1980, a copy of this is appended hereto, marked Exhibit A, and made a part hereof. It should be noted therefrom that the Judge had previously continued the trial of this case to allow discovery on five occasions and assigned the case for trial on March 10, 1980. We are advised that the trial has now been continued a sixth time until March 24, 1980, to allow time for this court to rule on this mandamus petition. The Judge has also denied the motion to disqualify filed by the City.

The record contains the Memorandum and Order of the Judge entered February 18, 1980, which denied the City's Revised and Supplemental Application for "Limited Discovery" as corrected January 21, 1980.

The word Limited was a misnomer because as pointed out by the Judge at this late date the proposed discovery "seeks answers by CEI to approximately 51 pages of what would appear to be detailed and highly complex interrogatories and, secondly, the production of a vast array of documentation, the mere description of which spans some 26 pages in length. In addition, the City requested permission to depose approximately 52 individuals, the majority of which were previously deposed in connection with the licensing proceeding before the Nuclear Regulatory Commission." CEI estimated that compliance with the limited discovery would entail an expenditure on its part of $300,000 exclusive of attorneys fees. In its February 18, 1980 Memorandum and Order, the Judge quoted language from his previous Memorandum and Order of January 23, 1976, as follows:

> "It is conceded by all parties and apparent from the documentation presented that the City has since May 1972, continuously litigated before the Federal Power Commission what appears to be substantially identical issues charging CEI and other defendants in this action with violation of the Sherman and Clayton Antitrust Acts . . . . It is equally apparent from the admissions of the parties and the exhibits herein that the City has engaged the defendants in extensive and exhaustive litigation of what appears to be substantially identical issues before the Nuclear Regulatory Commission for a period in excess of a year . . . . Defendants Ohio Edison and Penn Power in a brief filed December 1, 1975, in support of their Motions for Summary Judgment disclosed that the parties in the Nuclear Regulatory Commission case, including the plaintiff, have engaged in extensive discovery involving 63 depositions, comprehensive interrogatories all involving antitrust

charges. Requests for production of documents in regard thereto, have over the period of litigation resulted in production of 2.4 million pages of documents for the intervenors, including the plaintiff herein. This statement is not refuted by the City. Moreover, plaintiff had the opportunity to and did engage in exhaustive discovery during the two and one-half plus years that it engaged CEI in litigation involving what appears to be the identical antitrust issues before this Court in the proceeding before the Federal Power Commission styled City of Cleveland v. Cleveland Electric Illuminating, FPC Documents No. E-7631, E-7633 and E-7713."

Memorandum Opinion of January 23, 1976, at pp. 13-14.

In its Memorandum and Order of February 14, 1976, the court further stated:

"This Court has continuously viewed discovery proceedings in the most liberal light, extending to the adversary parties broad access to information and documents necessary for preparation preliminary to trial. Within this context, the Court notes that this proceeding is not of the usual circumstances wherein adversary parties confront each other for the first time without full knowledge of the issues, relevant facts, and evidence necessary to plead and litigate their claims. On the contrary, the record reflects that the parties have for 3½ years, since at least 1972, engaged in continuous litigation of issues that appear to be identical to those now presented to the Court. As the Court noted in its January 23 Order, the parties have heretofore conducted extensive and exhaustive discovery proceedings

in related actions before the Federal Power Commission and the Nuclear Regulatory Commission, involving, *inter alia,* some 63 depositions and production of 2.4 million pages of documents. Much of the information and documentation requested by plaintiff in these proceedings has already been produced, over a period of years, in these other actions.

While plaintif has, in the instant proceedings, fairly inundated defendants with interrogatories, requests for production of documents, and requests for stipulations and admissions, it does not appear to respond with equal fervor or diligence to similar requests of defendants. Moreover, upon careful review of the interrogatories and document requests of plaintiff, in light of defendants' objections to a number of these inquiries, it begins to appear that plaintiff's discovery efforts have not been conducted in absolute good faith. Rather, they manifest plaintiff's entrance upon a deliberate course of harassment and pursuit of dilatory tactics, calculated to overburden the defendants to this action and designed to frustrate the Court in providing the parties with a speedy trial."

* * *

"Counsel were clearly advised at the hearing on January 22 and in the Order of January 23 that the Court is resolute in its disapproval of dilatory tactics employed by counsel to effect continuance of trial. From this position, the Court does not waver."

Memorandum and Order of February 14, 1976, at pp. 7-9.

CEI filed a Memorandum in opposition to the City's Motion for a Stay attaching thereto Exhibits, a, b and c, which portrayed a History of Discovery in the case; the

oral comments of the Judge and a letter from the District Court Clerk.

We understand that the City is contending that the decisions of the federal regulatory agencies, Federal Power Commission and Nuclear Regulatory Commission, are res adjudicata because of collateral estoppel of some of the issues in this case and that the parties have stipulated to the use of the depositions, exhibits and other evidence offered before said agencies.

In other words, the Judge is contending that the City has been allowed ample discovery over a period of years and it did not always avail itself of the opportunity to obtain discovery and used the device of asking for additional discovery as a ruse to obtain numerous continuances, delay the trial, harass the defendants and subject them to unconscionable expense; that the City has not shown the necessity for any additional discovery in order to warrant any further postponements of the trial. The City denies all of this but we cannot determine these issues in a mandamus proceeding. They can only be determined in a direct appeal from a judgment entered in the antitrust case.

The law applicable to this proceeding is well settled. The Supreme Court has held specifically that "[T]he remedy of mandamus is a drastic one, to be used only in extraordinary situations" (citing authority); that mandamus actions 'have the unfortunate consequence of making the (district court) judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants (appearing) before him' in the underlying case; (quotation from *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 384, 385; that in "an era of excessively crowded lower court dockets, it is in the interest of a fair and prompt administration of justice

to discourage piecemeal litigation,"[1] that the "issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed" (citing authority). *Kerr v. United States District Court,* 426 U.S. 394, 402, 403; *Cf. Chemical and Industrial Corp. v. Druffel,* 301 F.2d 126 (6th Cir. 1962).

The District Court has broad discretion in handling pretrial discovery matters and they are not reviewable in a mandamus action. *Kyle Engineering Co. v. Kleppe,* 600 F.2d 226 (9th Cir. 1979).

Mandamus may not be used as a substitute for appeal. *Albert v. United States District Court,* 283 F.2d 61 (6th Cir. 1960).

In our opinion, this case does not present an extraordinary situation justifying the use of mandamus.

We are unable to find any abuse of discretion on the part of the Judge in his discovery orders entered in the antitrust case or in his order assigning the case for trial.

The motion to require the Judge to disqualify himself is not before us. In any event, it may not be reviewed by us in a mandamus proceeding. *Albert v. United States District Court, supra.* It may be reviewed upon appeal after the antitrust case has been decided. *Oliver v. Kalamazoo Board of Education,* 508 F.2d 178 (6th Cir.

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[1]As an example of piecemeal appeals the City moved in the District Court to disqualify the law firm of Squire, Sanders and Dempsey from representing its long time client CEI in the antitrust case on the ground that the law firm had represented the City in municipal bond matters. The District Court denied the motion to disqualify in an opinion reported in *City of Cleveland v. Cleveland Electric Illuminating Co.,* 440 F. Supp. 193 (N.D.O. 1977). We affirmed in an unreported decision listed in 573 F.2d 1310 (6th Cir. 1977), *cert. denied,* 98 S. Ct. 1648 (1978), as we discerned no conflict of interest. We also entered orders in the following: Nos. 77-3017 and 1310, No. 78-3223, No. 78-3001.

1974), *cert. denied*, 421 U.S. 963 (1975).

The petition for a writ of mandamus is dismissed.

**EXHIBIT A**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
U.S. Courthouse – Public Square
Cleveland, Ohio 44114

**Robert B. Krupansky**
**Judge**

March 3, 1980

[Filed: March 5, 1980]

Mr. John P. Hehman, Clerk
United States Court of
Appeals for the Sixth Circuit
516 U.S. Post Office & Cthse. Bldg.
Cincinnati, Ohio 45202

Re: *City of Cleveland v. Cleveland Electric Illuminating Co.*, Civil Action No. C75-560

Dear Mr. Hehman:

In response to the Motion of the City of Cleveland (City) to Stay District Court Proceedings Pending Disposition of Petitioner's Petition for a Writ of Mandamus, and the City's Petition for a Writ of Mandamus, it should be noted that on January 15, 1980, approximately one year after this trial court granted the City's essentially identical motion to pursue discovery, this Court scheduled this matter for trial to commence on March 10, 1980. Implementing its January 5, 1980 Order, the Court arranged its entire docket to accommodate the estimated eight weeks of trial time and summoned a panel of 200 prospective jurors with jury selection to commence on March 13. On five previous occasions, the Court, under similar circumstances, continued trial dates to accommodate the City. In each instance, the tactics of the City in avoiding a confirmed trial date were under-

taken literally on the eve of trial after the Court and multiple defendants had committed the necessary time and effort to the administration of the trial to a final resolution.

The City's latest effort to avoid the March 10 trial date was initiated by its Motion for Limited Discovery filed on January 16, 1980, just one day subsequent to the announcement of the present trial date. The City's pending Motion to Pursue Limited Discovery is essentially the same motion that it filed with this Court on January 2, 1979, a mere 34 days before a February 5, 1979 trial date that had been announced by Court Order dated March 24, 1978. In each instance, subsequent to achieving its continuance, the City failed to pursue the discovery that it petitioned. The voluminous Orders of this Court memorializing its five previous requests for continuances reflect the Court's exhaustive effort to accommodate the City in seeking orderly resolution of its problems with a view toward final disposition of this action by trial.

The enclosed Order of January 27, 1979 reflects the evolution and disposition of the discovery undertaken in this matter and the continuances granted. This Court's Order of February 18, 1980 overruling the City's current application for additional discovery provides a summary of events and the City's failure to pursue discovery during the interim between January 27, 1979 and the present.

The City's demonstrated concerted effort over four and one half years to avoid trial of this cause predictably announced its latest motion to which novelty no longer attaches. The City has and continues its endeavor to involve the Court in perpetuating an emotional, politically controversial issue. The stay of proceedings should

be denied as should the Petitioner's application for a Writ of Mandamus.

Correllary to the Petition for a Writ of Mandamus filed with the reviewing court, the City, on February 28, 1980 filed in the trial court a motion to disqualify the trial judge, which motion is presently under advisement. In conjunction therewith, on February 29, 1980, the trial court granted a stay of all proceedings pending its disposition of the disqualification motion.

Respectfully submitted,

/s/ Robert B. Krupansky
United States District Judge

RBK/slm

encls.

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

No. 80-3168

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[Decided and Filed: March 25, 1980]

CITY OF CLEVELAND,
*Plaintiff-Petitioner,*

*v.*

HONORABLE ROBERT B. KRUPANSKY,
United States District Judge for the Northern District of Ohio, Eastern Division

and

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
*Respondents.*

---

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION**

---

Before WEICK, Circuit Judge, PHILLIPS and PECK, Senior Circuit Judges.

PER CURIAM. The City of Cleveland (City) has filed in this court a Petition containing 106 pages for Writ of Mandamus To Compel Disqualification of the Honorable Robert B. Krupansky, United States District Judge for the Northern District of Ohio, Eastern Division (Judge).

Simultaneously therewith, the City filed three large volumes of Exhibits which it alleges provides the factual basis for the Petition.

The City also filed a motion to consolidate this mandamus petition to compel disqualification of the Judge with a previous petition for mandamus it filed against him in this court to compel pretrial discovery being No. 80-3146 on the docket of the court. We see no need to consolidate the cases since we had previously prepared our opinion (although it had not been finalized) denying the writ in No. 80-3146 and we therefore deny the motion to consolidate. The Judge has advised the clerk of our court that the scheduled trial of the antitrust case on March 24, 1980 will be postponed to await the decisions in both mandamus actions.

At the outset, it should be noted that the City's Motion To Disqualify was not filed until after the complex antitrust suit had been pending before the Judge since the time it was filed on July 1, 1975, or for 4 years and 9 months during which time, as shown by the three large volumes of exhibits, a multitude of proceedings had been conducted before the Judge resulting in many rulings, memorandum opinions and orders. It does seem to us that the City waited until a long time in order to discover that the Judge was biased.

The Motion To Disqualify pursuant to 28 U.S.C. § 455 and the Fifth Amendment to the United States Constitution, expressly states that it was based upon "the *attitude, demeanor, rulings and other written opinions* during the years that this action has been pending." (Emphasis added.) This in our opinion does not state a case for mandamus as all of it could have and undoubtedly did occur in judicial proceedings.

The City in its Memorandum in Support of Motion To Disqualify, which was filed about 11 days before the scheduled trial, March 10, 1980, and after the City had sought and secured five prior continuances and the City undertook to excuse the long delay by stating:

> The City was in no position to make a *final determination* of the fact that Judge Krupansky's lack of impartiality would impinge upon the City's right to a fair trial until Judge Krupansky denied the City's collateral estoppel motion in January 1980, and, in February 1980, the City's motion for limited discovery and the City's requested leave to file an amended complaint.
>
> Memorandum in Support of Motion to Disqualify at p. 9 (emphasis supplied).

The Judge, in an exhaustive Memorandum Opinion and Order containing 25 pages filed on March 8, 1980, undertook to give careful consideration to all of the issues raised by the City in its Motion To Disqualify and supporting papers and applied the applicable legal precedents in ruling on the legal sufficiency of the disqualification request. He stated "all facts stated with particularity are to be taken as true," but "[a]ssertions merely of a conclusionary nature are not enough nor are opinions or rumors." *United States v. Haldeman,* 559 F.2d 31, 131 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977).

He considered the relationship between the two statutory provisions 28 U.S.C. § 144 and the subsequently enacted Section 455 and held that they must be construed *in pari materia.* In so holding, he was supported by ample authority. In re *International Business Machines Corporation,* ___ F.2d ___ (2nd Cir. Feb. 25, 1980, No. 79-3070); *Davis v. Board of*

*School Commissioners of Mobile County*, 517 F.2d 1044 (5th Cir. 1975); *United States v. Olander*, 584 F.2d 876, 882. These cases also hold that disqualification under Section 455(a) must be predicated as previously under Section 144, upon extrajudicial conduct rather than on judicial conduct.

In *International Business Machines Corporation, supra*, the conduct of the District Judge in handling a complex antitrust case was similar in many respects to the conduct of the Judge in the present case particularly in respect of ruling so frequently against I.B.M. and his attitude toward counsel for I.B.M. The Second Circuit nevertheless held that "the rulings and conduct of the trial judge complained of here are legally insufficient to warrant recusal under Title 28 §§ 144, 145 or under the due process clause of the Fifth Amendment of the United States Constitution."

The Judge also applied the correct rule in passing upon affidavits which were conclusionary or constituted merely opinions.

The Judge further held that the Motion To Disqualify was not timely filed, relying on *International Business Machines Corp., supra*, and other cases.

It is obvious that the City was relying principally upon pretrial discovery orders of the judge as indicated in its first mandamus action.

Finally, it should be observed that we are reviewing the Judge's ruling denying the City's Motion To Disqualify not upon a direct appeal but in a mandamus proceeding. We stated the applicable rules governing mandamus proceedings in the City's Mandamus Petition To Compel Discovery, No. 80-3146.

In *Albert v. United States District Court for the Western District of Michigan,* 283 F.2d 61 (6th Cir. 1960), we held that mandamus was not the proper remedy to compel a judge to recuse himself. In the consideration of the sufficiency of an affidavit of bias and prejudice, the judge performs a judicial and not a ministerial act. We stated: "Before petitioner may resort to the extraordinary writ of mandamus, he must establish that he has a clear and certain right and that the duties of the respondent are ministerial, plainly defined and peremptory." This is certainly not the situation here where the orders and opinions involved the exercise of discretion. Mandamus does not lie to compel a judge of an inferior court to reverse a decision made by him in the exercise of legitimate jurisdiction. The order entered by a District Judge refusing to disqualify himself is not reviewable upon appeal until a final judgment has been entered in the case. *Collier v. Picard,* 237 F.2d 234 (6th Cir. 1956). No final judgment has been entered in the antitrust case pending in the District Court.

We followed *Albert* in *United States v. Battisti,* 486 F.2d 961, 964 (6th Cir. 1973). These decisions are binding on us.

In *Kelley v. Metropolitan County Board of Education,* 479 F.2d 810 (6th Cir. 1973), which was an appeal from an order entered in a school desegregation case in which a judge recused himself, we held that an order of recusal is within the discretion of the judge. Finding in the record no abuse of discretion, if the appeal is considered as such, it is dismissed or if the appeal is considered as a petition for mandamus, it is denied. Circuit Judge McCree wrote a concurring opinion in which he considered the duties of a judge in determining a motion for recusal.

In *Oliver v. Kalamazoo Board of Education*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), there was a direct appeal in a school desegregation case in which an affidavit of bias was filed against the District Judge and he declined to recuse himself for alleged misconduct just as objectionable and maybe more so than that charged against the Judge in the present case. A panel of our court sanctioned it as judicial and not involving personal bias. While this recusal was sought under § 144, we applied the same principle to one involving § 455(a) in *Woodruff v. Tomlin*, 593 F.2d 33, 44 (6th Cir. 1979), which ruling was not disturbed in the en banc hearing reported in ___ F.2d ___ (1980).

The Judge in his memorandum opinion and order closed with the statement:

> "The City identifies no personal prejudice and bias on the part of this Court because none exists. *United States v. International Business Machines Corp., supra*, 475 F. Supp. at 1391. To favorably entertain the City's motion would, under the facts and circumstances presented, constitute an entirely unwarranted abdication of judicial responsibility, and, in the considered opinion of this tribunal, delay ultimate resolution of this cause for an additional two to four years.
>
> Accordingly, the City's request that this Court disqualify itself pursuant to 28 U.S.C. § 455 and the Fifth Amendment to the United States Constitution is hereby denied. The Order staying the proceeding of this cause issued on February 29, 1980, shall be terminated as of March 19, 1980, and the trial of this matter shall proceed promptly on March 24, 1980, at 9:15 a.m.
>
> IT IS SO ORDERED."
>
> [Memorandum and Order p. 25.]

Chief Justice Burger in his Annual Report On The State of the Judiciary, February 3, 1980, made pertinent comments on the misuse and abuse of pretrial judicial process and suggested that judges must take a more active role in the management of litigation which is exactly what Judge Krupansky was endeavoring to do in the present case.

The Chief Justice stated:

> ***Misuse of Judicial Process***
>
> One factor which contributes to the high cost of legal services is the misuse and abuse of pretrial judicial processes. Yet we must not be too critical of lawyers for using the mechanisms permitted by statute or court rules. Roscoe Pound pointed out, nearly three-quarters of a century ago, that the very nature of our adversary system invites abuses. The responsibility for control rests on both judges and lawyers. Where existing rules and statutes permit abuse, they must be changed. Where the power lies with judges to prevent or correct abuse and misuse of the system, judges must act.
>
> Litigation does not manage itself. Within reason, trial judges must take a more active role in the management of litigation by enforcing schedules and limiting freewheeling pretrial activities. Sanctions must be used to prevent or penalize abuses and judges are making greater use of this kind of control.

The petition for a writ of mandamus is dismissed.

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 80-3146

[Filed: May 6, 1980]

CITY OF CLEVELAND,
*Plaintiff-Petitioner,*
*v.*
HONORABLE ROBERT B. KRUPANSKY, United States District Judge for the Northern District of Ohio Eastern Division and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
*Respondents.*

### ORDER

Before WEICK, Circuit Judge and PHILLIPS and PECK, Senior Circuit Judges.

No active judge of this court having requested that a vote be taken on the suggestion of the Plaintiff-Petitioner that its petition for rehearing be heard en banc, said petition for rehearing was referred by the Chief Judge of this court to the panel for consideration.

Upon consideration, we are of the opinion that the issues in this mandamus proceeding were adequately treated in our Per Curiam opinion and that the petition for rehearing is without merit.

It is therefore ordered that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

## APPENDIX D

## UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 80-3168

[Filed: May 6, 1980]

CITY OF CLEVELAND,

*Plaintiff-Petitioner,*

*v.*

HONORABLE ROBERT B. KRUPANSKY, United States District Judge for the Northern District of Ohio Eastern Division and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

*Respondents.*

### ORDER

Before WEICK, Circuit Judge and PHILLIPS and PECK, Senior Circuit Judges.

No active judge of this court having requested that a vote be taken on the suggestion of the Plaintiff-Petitioner that its petition for rehearing be heard en banc, said petition for rehearing was referred by the Chief Judge of this court to the panel for consideration.

Upon consideration, we are of the opinion that the issues in this mandamus proceeding were adequately treated in our Per Curiam opinion and that the petition for rehearing is without merit.

It is therefore ordered that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

## APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

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**Civil Action No. C75-560**

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[Filed: January 23, 1976]

CITY OF CLEVELAND,
*Plaintiff,*

*v.*

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *et al.*,
*Defendants.*

---

## MEMORANDUM OPINION

KRUPANSKY, J.

This is an action instituted by the plaintiff City of Cleveland (City) against defendants Cleveland Electric Illuminating Company (CEI), Duquesne Light Company (Duquesne), Ohio Edison Company (Ohio Edison), Pennsylvania Power Company (Penn Power), and Toledo Edison Company (Toledo Edison) charging a conspiracy to violate Sections 4 and 16 of the Clayton Act as amended, 15 U.S.C. Sections 15, 26 and Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2. In substance the plaintiff charges that the defendants combined and conspired:

A. To refuse to wheel or to allow the transmission of electric power and energy from other power suppliers to plaintiff, or from plaintiff to any other electric utility system which is an actual or potential competitor of any of the defendants, over transmission lines owned or controlled by the defendants or any of them.

B. To boycott and refuse to deal with plaintiff and others in the power exchange market, except on terms that would maintain domination and exclusive control by the defendants over electric bulk power supply in the area served by each, and that would be harmful to the interest of the plaintiff and other actual and potential competitors at wholesale or retail.

C. To refuse to admit plaintiff to membership in CAPCO or to otherwise permit plaintiff to have access to the benefits of coordinated operations and development or any other benefit of power pooling or power exchange services.

D. To engage in other activities for the purpose and with the effect of restraining and eliminating competition in electric power and energy.

Thereby preventing the City from:

A. Obtaining an interconnection for operation-normally-in parallel;

B. Purchasing power and energy from sources other than CEI;

C. Maintaining its generating units in good operating condition;

D. Expanding its own generation with bulk power supply which participates in economies of scale available from access to the power exchange market;

E. Competing for industrial loads;

F. Issuing bonds to finance improvements and extensions of its system;

G. Utilizing the only available transmission grid to obtain firm electric power in bulk from sources other than defendants;

H. Utilizing the only available transmission grid to participate in the power exchange market;

I. Constructing transmission lines to interconnect its system with the electric systems of the Cities of Painesville and Orville to effect the limited power exchange arrangements available thereby;

J. Providing continuous service to its customers with CEI's knowledge of the anticipated and actual effect of service interruptions on the ability of the City to retain its customers while CEI held itself out to provide service with few interruptions to these same customers;

K. Retaining as its customers a substantial number of retail industrial and large commercial customers who switched their patronage to CEI as a result of frequent service interruptions;

L. Achieving the growth in load it would have achieved absent any anticompetitive restriction in power exchange services.

To place palintiff's motion in proper perspective a review of the record to date is in order.

1. The action was initiated by a Complaint filed on July 1, 1975;

2. Service was expeditiously perfected upon defendants:

A. CEI–July 7, 1975
B. Toledo Edison–July 8, 1975
C. Duquesne–July 8, 1975

D. Penn Power—July 10, 1975
E. Ohio Edison—July 17, 1975

3. Upon Motion duly made and without objection from the plaintiff, the Court granted the following motions to enlarge time within which to answer:

A. Toledo Edison—July 25-August 27, 1975
B. Duquesne—July 25-September 8, 1975
C. CEI—July 25-August 27, 1975
D. Ohio Edison and Penn Power—July 29-September 30, 1975.

4. On July 30, 1975, City filed its acquiescence to defendants' above Motions.

5. On August 5, 1975, this Court issued its Pre-Trial Order delineating in detail the time sequence for the discovery proceedings, said Pre-Trial Order contained the following admonitions:

A. Extensions of time will not be allowed except upon the showing of good cause, by written motion, to the Court (p. 2).

B. Upon expiration of the discovery period, cases are subject to *immediate* trial (p. 3).

C. The following notice appeared in said Pre-Trial Order in capital letters for emphasis:

***NOTICE***

Counsel are requested to diligently pursue and complete discovery preparatory to trial within the time schedule assigned by the Court. The Court does not favor leaves to plead and requests to continue scheduled trial dates. Continuances will be granted only under extraordinary circumstances.

Counsel's cooperation is solicited.

6. On August 21, 1975, CEI moved for further extention without objection from the City—granted to September 29, 1975;

7. On August 25, 1975, Toledo Edison's Motion for extension without objection from the City was granted to September 30, 1975;

8. On August 26, 1975, defendant Duquesne filed its answer;

9. On September 17, 1975, James B. Davis, Law Director for the City, appeared before the Court with John Lansdale, counsel for defendant CEI, and upon oral Motion an additional 60 days to December 1, 1975, within which to answer was extended to CEI pending settlement negotiations between the parties;

10. On September 25, 1975, defendants Ohio Edison, Penn Power and Toledo Edison upon Motions duly made without objection from the City were granted additional time within which to answer to December 1, 1975;

11. The Court's Pre-Trial Order dated August 5, 1975, specifically ordered:

> c. All discovery, including depositions, . . . examinations, shall be completed within 120 days, or extension thereof, after service of the complaint. *The fact that motions of any type are pending ruling before the Court shall not constitute good cause to suspend, delay or defer discovery proceedings.*

12. Pursuant to the above Pre-Trial Order all discovery closed on November 14, 1975;

13. During the entire period neither the plaintiff City nor any named defendant petitioned the Court to extend the period for discovery, nor did any party pursue any form of discovery whatsoever;

14. On December 1, 1975, Toledo Edison filed its answer, and CEI filed its answer and counterclaim;

15. On December 2, 1975, Ohio Edison and Penn Power filed Motions for Summary Judgment;

16. On December 2, 1975, defendant CEI filed its Motion for Preliminary Injunction. A hearing on the merits of CEI's motion was scheduled by the Court to commence on December 17, 1975;

17. On December 15, 1975, six months after commencement of this action, the City filed its Motion to Disqualify Squire, Sanders & Dempsey as legal counsel for CEI although it had filed similar motions of disqualification before the Nuclear Regulatory Commission some months previously. The City's belated action in filing the Motion for Disqualification two days before the scheduled hearing on CEI's Motion for Preliminary Injunction has every appearance of a dilatory tactic.

18. On December 17, 1975, all parties to this action appeared before the Court and upon request the Court conducted pre-trial discussions preliminary to proceeding with the formal hearing on the Motion for Preliminary Injunction. Subsequent to exhaustive discussions for approximately three hours involving all legal aspects of the case including the pending proceedings before the Nuclear Regulatory Commission, and the Federal Power Commission, the Court continued the scheduled hearing upon the representations that the parties desired to conduct further meaningful settlement negotiations. The Court rescheduled the hearing on the Motion for Preliminary Injunction to January 12, 1976;

19. During the intervening 26 days, no meeting occurred between the parties although the one such meeting scheduled by defendant CEI was cancelled by the City without reason;

20. On January 7, 1976, approximately six and one-half months after the commencement of this action, and 54 days after the expiration of the period allotted for discovery by the Court's Pre-Trial Order of August 5, 1975, and without leave of Court having been requested, the City filed upon defendants Toledo Edison, Penn Power, Ohio Edison and Duquesne approximately 10 pages of interrogatories and upon CEI approximately 45 pages of interrogatories. This constituted the only discovery initiated by the City and/or any other party to this action.

21. On January 12, 1976, the Court having set aside the necessary time to accommodate the taking of evidence on the Motion for Preliminary Injunction, the City without previous notice or indication to any of the parties or the Court appeared in open court and tendered a monetary payment to CEI with assurances to maintain current all future payments for energy received over the permanent 138,000 KV interconnection ordered by the Federal Power Commission, thereby rendering moot the Motion for Preliminary Injunction which was thereupon withdrawn by defendant CEI.

22. As a result of a three and one-half hour pre-trial conducted by the Court with the parties on the same date and upon representations of the parties that meaningful settlement negotiations would resume, the Court ordered the scheduled hearing on the City's Motion to Disqualify Squire, Sanders & Dempsey as legal counsel for CEI continued to March 1, 1976. Depending upon the ruling on the disqualification motion, trial of the merits was scheduled to commence immediately thereafter. Trial dates were thereby extended for an additional 48 days;

23. During the hearing, on January 12, 1976, the Court specifically directed all counsels' attention to its

Pre-Trial Order of August 5, 1975, delineating its ordered discovery schedule and specifically called counsels' attention to the fact that discovery was not tolled pending pleading or extentions therefore, rulings on pending motions, or settlement negotiations;

24. No legal counsel for any of the parties indicated a need to extend the time for discovery;

25. Later that afternoon, Robert D. Hart, Assistant Law Director for the City, for the first time, inquired of this Court's law clerk the Court's disposition toward extending discovery proceedings. Subsequent to conferring with the Court, the law clerk advised Mr. Hart that the Court would, upon formal written motion, in all probability entertain extending discovery to March 1st, the date upon which trial was to commence.

26. Anticipating the immediate filing of said motion, counsel for CEI was advised by telephone to expedite its responses to the City's interrogatories;

27. On January 15, 1976, the City finally filed its Motion for Extension of Discovery inferring a request to continue the trial date of March 1, 1976, to some indefinite future period;

28. The City's formal motion for extension of discovery filed on January 15, 1976, approximately six and one-half months after the commencement of this action, and 54 days subsequent to the closing of discovery period fixed by the Court's Order of August 5, 1975, and 45 days before trial of this case represents the City's first request to extend discovery. No other party to this action has to this date filed a similar request;

29. On January 20, 1976, Toledo Edison filed its objections to extending discovery and moved to quash

the City's request for interrogatories filed on January 7, 1976;

30. On January 20, 1976, defendant CEI by formal motion entered no objection to City's request to extend discovery to trial date, and further agreed to expeditiously respond to plaintiff's interrogatories; however, it entered objection to City's inferred request for continuance of trial scheduled to commence on March 1, 1976.

As a general principle of law a trial court may exercise wide discretion in permitting discovery procedure under Rule 33 of the Federal Rules of Civil Procedure, and in the absence of a ruling which results in substantial prejudice to the rights of the parties there is no abuse of discretion. Similarly, as enunciated by the Sixth Circuit Court of Appeals in *Merritt-Chapman & Scott Corporation v. Kent,* 309 F.2d 891 (6th Cir. 1962):

> The continuance of a case is a matter which rests within the sound discretion of the trial court. A denial of continuance may be reviewed by us only when that discretion has been abused.

*MacKay v. American Potash & Chemical Co.,* 268 F.2d 512 (9th Cir. 1959); *Fulton v. Coppco, Inc.,* 407 F.2d 611 (10th Cir. 1969); *Huff v. N. D. Cass Company of Alabama,* 468 F.2d 172 (5th Cir. 1972); *Rutledge v. Electric Hose & Rubber Company,* 511 F.2d 668 (9th Cir. 1975); *Dolgow v. Anderson,* 53 F.R.D. 664 (E.D. N.Y. 1971).

Discovery proceedings are available to the parties immediately upon the commencement of an action. Rule 33 provides the manner and time within which interrogatories may be served and the time within which responses are required. The time therein specified may be extended

or contracted within the discretion of the Court. Rule 33 of the Federal Rules of Civil Procedure as supplemented by this Court's Order dated August 5, 1975, delineated the time sequence for discovery as applied to the parties in this action.

The Court must assume that the City's failure to pursue discovery pursuant to the Federal Rules of Civil Procedure and the Order of August 5, 1975, resulted from the City's:

1. Intention not to pursue discovery;

2. Failure to read the Court's Order of August 5, 1975;

3. Complete disregard of said Order.

The City's failure to initiate and pursue any discovery whatsoever for a period of six and one-half months and, suddenly, 53 days before trial, for the first time serve the defendants with Requests for Answers to Interrogatories does not reflect well upon the City's sincerity and intention to undertake discovery in this case in good faith.

The present action is but one of approximately 43 cases assigned to this Court for disposition each month. This caseload coupled with the Reorganization Proceedings of the Erie Lackawanna Railway Company, which has been administered by this Court these last three years, requires precise scheduling of trial assignments to insure equal justice to all persons coming before this Court.

Although trial of this action may be protracted and require the allocation of five to seven weeks of trial time, the issues involved are not overly complex but rather relatively simple. The eight month period intervening

between filing of this action on July 1, 1975, and trial date of March 1, 1976, represents a reasonable time within which preparation including discovery, diligently pursued, could be accomplished. Plaintiff having voluntarily elected this forum to litigate its grievances is expected and required to reasonably conform with applicable rules of federal procedure, the rules of this Court and particularly specific Orders of this Court.

Judge Irving R. Kaufman speaking for the Second Circuit in *Davis v. United Fruit Company,* 402 F.2d 328 (2nd Cir. 1968), *cert. denied,* 393 U.S. 1085 (1969), succinctly summarized the responsibility of trial courts and trial counsel to respond to the public demand for speedy trial said:

> The failure to be ready for trial when called—unfortunately, a condition too prevalent in our courts—is one of the basic causes creating a backlog of calendars. The ensuing delay caused by adjournments and other dilatory tactics, not only hobbles justice but causes the public to mistrust the entire judicial process.
>
> * * *
>
> The courts must take the initiative in making their procedures more efficient, and the bar must be prepared to cooperate in that effort if the judicial process is to maintain its vitality. The district courts of this Circuit have worked out precise and elaborate methods to notify attorneys of the progress of their cases on the calendars primarily so that counsel can gather in their witnesses and be ready to proceed to trial on schedule. The bar must have equally precise procedures for preparing cases and ensuring that witnesses will be available at trial. And, we know from long experience that if counsel fails to proceed when his case

> is called for trial in regular turn, the court, having set aside time in expectation of that trial, may forfeit precious hours or days until another case can be readied. Other parties and counsel may be inconvenienced, and jurors may be forced to wait idly. Had Judge MacMahon granted this continuance, not only would valuable trial time have been lost but cases scheduled for trial after this one would have been dislocated at the last moment from their regular order and forced to trial out of turn. Bardin v. Mondon, 298 F.2d 235 (2nd Cir. 1961). Ergo, disarrangement breeds disarrangement. 402 F.2d at 330-331.

*Greyhound Lines, Inc. v. Miller,* 402 F.2d 134 (8th Cir. 1968); *Chung Wing Ping v. Kennedy,* 294 F.2d 735 (D.C. Cir.), *cert. denied,* 368 U.S 938 (1961).

The Court having made every effort to accommodate the parties to this action is constrained to continue discovery to March 1, 1976, the date upon which the trial herein will commence.

The Court's decision to proceed on March 1, 1976, as heretofore ordered is further impacted by information and documentation presented to the Court in the form of exhibits, affidavits, depositions in support of and in opposition to various motions filed herein.

It is conceded by all parties and apparent from the documentation presented that the City has since May 1972, continuously litigated before the Federal Power Commission what appears to be substantially identical issues charging CEI and other defendants in this action with violation of the Sherman and Clayton Antitrust Acts which charges incidentally were held to be without merit by said Commission in its Order No. 644 dated January 11, 1973, thereafter affirmed on appeal by the

Washington, D.C. Circuit Court of Appeals on January 9, 1976. It is equally apparent from the admissions of the parties and the exhibits herein that the City has engaged the defendants in extensive and exhaustive litigation of what appears to be substantially identical issues before the Nuclear Regulatory Commission for a period in excess of a year. This later proceeding includes efforts of the City to disqualify the law firm of Squire, Sanders & Dempsey from representing CEI in that action. Defendants Ohio Edison and Penn Power in a brief filed December 1, 1975, in support of their Motions for Summary Judgment disclosed that the parties in the Nuclear Regulatory Commission case, including the plaintiff, have engaged in extensive discovery involving 63 depositions, comprehensive interrogatories all involving antitrust charges. Requests for production of documents in regard thereto, have over the period of litigation resulted in production of 2.4 million pages of documents for the intervenors, including the plaintiff herein. This statement is not refuted by the City. Moreover, plaintiff had the opportunity to and did engage in exhaustive discovery during the two and one-half plus years that it engaged CEI in litigation involving what appears to be the identical antitrust issues before this Court in the proceeding before the Federal Power Commission styled City of Cleveland v. Cleveland Electric Illuminating, F.P.C. Documents No. E-7631, E-7633 and E-7713.

This Court personally has devoted innumerable days and endless hours in examining hundreds upon hundreds of exhibits, reviewing innumerable depositions and researching applicable law in considering the motions for summary judgment and responses thereto. Approximately 650 pages of exhibits supporting defendant Ohio

Edison's Motion for Summary Judgment and approximately 400 pages of exhibits supporting City's response thereto were included in that effort. This in addition to the maximum research effort committed to this case by the Court through its legal research staff.

Accordingly, in view of the City's protracted litigation of substantially the identical antitrust issues presented by this action during the four years last past before two independent federal agencies, each proceeding having provided exhaustive discovery to the plaintiff, coupled with the volumes of documentation available to the City as a result of these independent proceedings, together with innumerable depositions taken in conjunction therewith militates against the City's complaint that it has had inadequate discovery and opportunity to prepare for the trial scheduled to commence on March 1, 1976.

It is therefore ORDERED that:

1. The City's Motion to Extend Discovery is granted to the date of trial;

2. Defendants will respond to City's interrogatories by no later than February 6, 1976;

3. Defendants Ohio Edison and Penn Power shall file answers to the Complaint not later than January 30, 1976;

4. The defendant Toledo Edison's Motion to Terminate Discovery by Plaintiff is denied;

5. Hearing on the plaintiff's Motion to Disqualify the law firm of Squire, Sanders & Dempsey will commence on March 1, 1976 as heretofore ordered on January 12, 1976;

6. Immediately upon the conclusion of the above hearing and in the event of a disposition favorable to

the City, trial on the merits will be continued for a reasonable period not to exceed 60 days to permit CEI to retain new legal counsel; in the event of a disposition adverse to the City trial on the merits will proceed forthwith;

7. Counsel shall file with this Court by not later than February 23, 1976, the following:

A. Written stipulations of fact and admissions, if any;

B. Proposed findings of fact and conclusions of law referenced with supporting legal authority together with a list of witnesses, the substance of their testimony (to be kept in confidential status by the Court, if so indicated);

C. File and exchange all documents anticipated to be offered as exhibits with stipulations as to authenticity and admissibility or in the alternative, objections thereto supported by memorandums of law. Proposed exhibits shall be properly marked for identification purposes with official labels which are available upon request from the clerk. This shall be accomplished by not later than February 23rd as above indicated;

D. Counsel shall submit to the Court in writing by not later than the above date of February 23, 1976, suggested questions to be directed to the jury panel during the course of voir dire examination;

E. Counsel shall submit to the Court in written form supported by appropriate legal authority by not later than February 23, 1976, any proposed jury instructions to be requested at the conclusion of the trial.

IT IS SO ORDERED.

/s/ Robert B. Krupansky
United States District Judge

## APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

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**Civil Action No. C75-560**

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[Filed: February 14, 1976]

CITY OF CLEVELAND,
*Plaintiff,*

*v.*

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *et al.*,
*Defendants.*

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## MEMORANDUM AND ORDER

KRUPANSKY, J.

This is an action instituted by the plaintiff City of Cleveland (City) against defendants Cleveland Electric Illuminating Company (CEI), Duquesne Light Company (Duquesne), Ohio Edison Company (Ohio Edison), Pennsylvania Power Company (Penn Power), and Toledo Edison Company (Toledo Edison) charging a conspiracy to violate Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The jurisdiction of this Court is properly invoked pursuant to Sections 4 and 16 of the Clayton Act, as amended, 15 U.S.C. §§ 15 and 26.

On February 6, 1976, plaintiff filed its Motion for Revision of Procedural Schedule with supporting affidavit. Defendants CEI, Ohio Edison and Penn Power filed separate responses on February 11, 1976, strongly objecting to the requested revision of the pre-trial schedule. Plaintiff requests a 60-day continuance of the previously appointed trial date of March 1, 1976, with an attendant extension of pre-trial discovery to March 20, and further extension of time within which to submit stipulations and admissions, trial briefs, witness lists, etc. Defendant CEI opposes such continuance and extension, indicating its willingness and ability to proceed to trial as previously scheduled.

The Court has previously confronted the identical issues raised herein in plaintiff's Motion for Extension of Procedural Dates, filed on January 15, 1976. Following a detailed and exhaustive review of the chronology of pleadings to date, the Court, on January 22, 1976 granted a liberal extension of pre-trial discovery to March 1, 1976, the date previously set for trial, and further devised an accelerated schedule of pre-trial discovery to ensure adequate discovery without necessitating continuance of the trial date. Defendants have, to date, complied with that schedule, and have even acted in advance thereof. The Court, then, upon consideration of the instant Motion, deems it appropriate to reiterate a portion of the chronology of pleadings and events discussed in the January 22 Order and the principles of law affirmed therein, and to outline the chronology of pleadings subsequent thereto.

Discovery is permitted upon commencement of the action. Rule 26 *et seq.*, Fed. R. Civ. P. The action herein commenced with the filing of the Complaint on July 1, 1975. In its Pre-Trial Order of August 5, 1975, the

Court delineated a schedule of pre-trial discovery which would conclude within 120 days, or extension thereof, after service of the Complaint. Accordingly, all discovery closed on November 14, 1975. The Pre-Trial Order further indicated that "the fact that motions of any type are pending ruling before the Court shall *not* constitute good cause to suspend, delay or defer discovery proceedings"; that "extensions of time will not be allowed except upon the showing of good cause, by written motion, to the Court"; that "upon expiration of the discovery period, cases are subject to *immediate* trial"; and finally, in capital letters for emphasis:

***NOTICE***

**COUNSEL ARE REQUESTED TO DILIGENTLY PURSUE AND COMPLETE DISCOVERY PREPARATORY TO TRIAL WITHIN THE TIME SCHEDULE ASSIGNED BY THE COURT. THE COURT DOES NOT FAVOR LEAVES TO PLEAD AND REQUESTS TO CONTINUE SCHEDULED TRIAL DATES. CONTINUANCES WILL BE GRANTED ONLY UNDER EXTRAORDINARY CIRCUMSTANCES.**

**COUNSEL'S COOPERATION IS SOLICITED.**

Notwithstanding the foregoing notices, and the daily opportunity to engage in discovery proceedings or to request extension thereof, (indeed, the opportunity to make oral requests for extension at either of two conferences in chambers with the Court and opposing parties on September 17 and December 17, 1975), plaintiff failed to initiate or engage in any discovery proceedings whatsoever, or to request an extension of time allotted therefor until January 7, 1976, more than six months subsequent to commencement of this action and 54 days after the close of discovery pursuant to the August 5 Pre-Trial Order.

Plaintiffs, on January 7, 1976, without earlier or contemporaneous request for extension of discovery,

and with insouciant disregard of the Federal Rules of Civil Procedure, the Rules of Court and this Court's emphatic Pre-Trial Order, filed interrogatories and requests for production of documents. Five days later, at a January 12 hearing upon defendant CEI's Motion for Preliminary Injunction, the Court reminded all counsel of its Pre-Trial Order of August 5, 1975, specifically directing counsel's attention to the ordered discovery schedule delineated therein and the admonishment that discovery is not tolled pending ruling on motions. Even then, despite the extant interrogatories and requests for documents, plaintiff did not, nor did any of the parties, move for or indicate any need for extension of discovery. As a result of a three and one-half hour pre-trial conference conducted by the Court with the parties on the same date, and upon representations of the parties that meaningful settlement negotiations would resume, the Court set trial to commence on March 1, 1976.

It was not until after the January 12 hearing, and upon inquiry directed to this Court's law clerk that counsel for plaintiff indicated any intention to seek extension of discovery, at which time the Court orally alerted and advised opposing counsel for CEI to respond to plaintiff's interrogatories by February 6, 1976. Apprised that the Court would, in all probability, entertain with favor a formal written motion to extend discovery to March 1, (the date upon which trial would commence), plaintiff filed, on January 15, its Motion for Extension of Procedural Dates. Therein plaintiff inferred its desire for a continuance of the trial date. On January 20, defendant CEI filed its response, indicating its intention to expeditiously respond to plaintiff's interrogatories and its acquiescence in the extension of discovery to the trial date. Defendant Toledo Edison

responded that same day with its Motion to Terminate Discovery. The issue was brought to a hearing on January 22 wherein the Court entertained oral argument from all parties.

At the January 22 hearing, counsel for plaintiff restated its Motion to extend discovery, further declaring that while plaintiff did not object to the March 1 trial date, neither did it accede to that timetable, a position apparently calculated to delay to some future time an express declaration of its intention to forthrightly request a continuance of trial date, all designed to frustrate the Court's orderly disposition of this matter and the administration of its trial docket. In rebuttal, each defendant agreed to the extension of discovery to March 1, but objected to the continuance of the trial date.

The Court, upon consideration of the motions before it, the oral argument of counsel and relevant principles of law, and after an exhaustive review of the pleadings to date, granted plaintiff's Motion to extend discovery to the trial date and reiterated its intention to proceed to trial on March 1. In addition, the Court devised a definitive pre-trial schedule, supplementing the earlier discovery schedule, which required adherence to the following timetable:

1.) Defendants Ohio Edison and Penn Power shall file Answers to the Complaint not later than January 30, 1976.

2.) Defendants will respond to plaintiff's interrogatories not later than February 6, 1976.

3.) Counsel shall file with this Court not later than February 23, 1976:

A.) Written stipulations of fact and admissions, if any;

B.) Proposed findings of fact and conclusions of law referenced with supporting legal authority;

C.) Lists of witnesses to be called at trial and the substance of their testimony;

D.) All documents to be offered as exhibits at trial with stipulations as to authenticity and admissibility, or, in the alternative, objections thereto supported by memorandums of law;

E.) Suggested questions to be directed to the jury panel on voir dire examination;

F.) Proposed jury instructions;

4.) On March 1, 1976, the Court will conduct a hearing on plaintiff's Motion to Disqualify the law firm of Squire, Sanders & Dempsey.

5.) Upon the conclusion of the disqualification hearing and in the event of a ruling favorable to defendants, trial on the merits will proceed forthwith on March 1. In the event of a ruling favorable to plaintiff, trial will be continued for a reasonable period not to exceed 60 days to permit defendant CEI to seek and retain new legal counsel.

In compliance with the Ordered pre-trial schedule outlined above, defendants CEI and Ohio Edison, (the only defendants to whom interrogatories were propounded by plaintiff), filed their answers to those interrogatories on January 30 and February 6. In response to plaintiff's requests for documents, all defendants have either submitted to plaintiff copies of said documents, permitted inspection of said documents, or entered objections to plaintiff's request. In addition,

defendant CEI has requested an in camera review of four cartons of documents subject to claimed privilege. Plaintiff has, in addition, submitted fourteen separate requests for stipulations and admissions. While defendants' responses thereto are not due until February 23, pursuant to the Order of January 23, defendant Duquesne has already engaged in response thereto.

The Court further notes that defendants have also engaged in discovery proceedings subsequent to the January 23 Order. On January 27, defendant Toledo Edison submitted to plaintiff interrogatories and requests for production of documents. On February 2, defendants Ohio Edison and Penn Power submitted to plaintiff their joint interrogatories and requests for production of documents. On February 9 and 12, defendant Duquesne Light submitted interrogatories to plaintiff, as well as its requests for production of documents. Plaintiff has yet to respond to any of these requests and interrogatories.

This Court has continuously viewed discovery proceedings in the most liberal light, extending to the adversary parties broad access to information and documents necessary for preparation preliminary to trial. Within this context, the Court notes that this proceeding is not of the usual circumstance wherein adversary parties confront each other for the first time without full knowledge of the issues, relevant facts, and evidence necessary to plead and litigate their claims. On the contrary, the record reflects that the parties have for 3½ years, since at least 1972, engaged in continuous litigation of issues that appear to be identical to those now presented to the Court. As the Court noted in its January 23 Order, the parties have heretofore conducted extensive and exhaustive discovery proceedings in related

actions before the Federal Power Commission and the Nuclear Regulatory Commission, involving, *inter alia,* some 63 depositions and production of 2.4 million pages of documents. Much of the information and documentation requested by plaintiff in these proceedings has already been produced, over a period of years, in these other actions.

While plaintiff has, in the instant proceedings, fairly inundated defendants with interrogatories, requests for production of documents, and requests for stipulations and admissions, it does not appear to respond with equal fervor or diligence to similar requests of defendants. Moreover, upon careful review of the interrogatories and document requests of plaintiff, in light of defendants' objections to a number of these inquiries, it begins to appear that plaintiff's discovery efforts have not been conducted in absolute good faith. Rather, they manifest plaintiff's entrance upon a deliberate course of harassment and pursuit of dilatory tactics, calculated to overburden the defendants to this action and designed to frustrate the Court in providing the parties with a speedy trial.

The foregoing is reflected in one instance by plaintiff's January 7 request No. 95 for the production of voluminous documents (a listing of 26½ pages of itemized demands). Defendant CEI, responding thereto, refused production of a substantial number of such documents claiming privilege and work product, and submitted the questioned documents for in-camera inspection. The Court, anticipating an immediate or at least timely Motion to Compel Production, committed untold hours from its daily administrations and its personal time to accommodate the plaintiff with a timely ruling. Such motion has not materialized during the 15 days subse-

quent to defendants' objections; nor has there been the slightest indication that such motion is forthcoming even after the Court has directed plaintiff's attention to its failure to diligently pursue this particular discovery demand. In what appears to be a further effort to frustrate the Court's orderly proceedings and to harass and obstruct the defendants, plaintiff City, on February 9, issued Notices to Take Depositions of certain named individuals attaching thereto subpoenas *duces tecum* ordering the production of documents listed on 28 pages of itemized demands. In the course of its review of the subpoenas *duces tecum*, in conjunction with a Motion for a Protective Order seeking to quash said subpoenas filed herein by the defendants CEI, the Court again committed innumerable hours of its time in reviewing, examining and evaluating the demanded documents. A comparative analysis thereof disclosed that, with few exceptions, the documents listed in the subpoenas *duces tecum* were identical to those demanded in request No. 95 filed on January 7, 1976. Attached to the subpoenas *duces tecum* were indices of documents, compiled by CEI, identifying the documents submitted to the Court for in-camera inspection subsequent to claiming privilege and work-product as to those selfsame documents demanded on January 7. Plaintiff's tactics lend support to a conclusion that plaintiff is not sincerely interested in the production of the documents but rather seeks only to obstruct and overburden defendants.

Counsel were clearly advised at the hearing on January 22 and in the Order of January 23 that the Court is resolute in its disapproval of dilatory tactics employed by counsel to effect continuance of trial. From this position, the Court does not waver. The Court reaffirms its approval of Judge Irving R. Kaufman's succinct

summary of the responsibility of the trial court and trial counsel to respond to the public demand for speedy trial when he stated, in *Davis v. United Fruit Company*, 402 F.2d 328 (2nd Cir. 1968), *cert. denied*, 393 U.S. 1085 (1969):

> The failure to be ready for trial when called—unfortunately, a condition too prevalent in our courts—is one of the basic causes creating a backlog of calendars. The ensuing delay caused by adjournments and other dilatory tactics, not only hobbles justice but causes the public to mistrust the entire judicial process.
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> * * *
>
> The courts must take the initiative in making their procedures more efficient, and the bar must be prepared to cooperate in that effort if the judicial process is to maintain its vitality. The district courts of this Circuit have worked out precise and elaborate methods to notify attorneys of the progress of their cases on the calendars primarily so that counsel can gather in their witnesses and be ready to proceed to trial on schedule. The bar must have equally precise procedures for preparing cases and ensuring that witnesses will be available at trial. And, we know from long experience that if counsel fails to proceed when his case is called for trial in regular turn, the court, having set aside time in expectation of that trial, may forfeit precious hours or days until another case can be readied. Other parties and counsel may be inconvenienced, and the jurors may be forced to wait idly. Had Judge MacMahon granted this continuance, not only would valuable trial time have been lost but cases scheduled for trial after this one would have been dislocated at the last moment from their regular order and forced to trial out of turn. Bardin v. Mondon, 298 F.2d

235 (2nd Cir. 1961). Ergo, disarrangement breeds disarrangement. 402 F.2d at 330-331.

*Greyhound Lines, Inc. v. Miller,* 402 F.2d 134 (8th Cir. 1968); *Chung Wing Ping v. Kennedy,* 294 F.2d 735 (D.C. Cir.), *cert. denied,* 368 U.S. 938 (1961).

As enunciated by the Sixth Circuit Court of Appeals in *Merritt-Chapman & Scott Corporation v. Kent,* 309 F.2d 891 (6th Cir. 1962):

> The continuance of a case is a matter which rests within the sound discretion of the trial court. A denial of continuance may be reviewed by us only when that discretion has been abused. *Id.*

*MacKay v. American Potash & Chemical Co.,* 268 F.2d 512 (9th Cir. 1959); *Fulton v. Coppco, Inc.,* 407 F.2d 611 (10th Cir. 1969); *Huff v. N. D. Cass Company of Alabama,* 468 F.2d 172 (5th Cir. 1972); *Rutledge v. Electric Hose & Rubber Company,* 511 F.2d 668 (9th Cir. 1975); *Dolgow v. Anderson,* 53 F.R.D. 664 (E.D. N.Y. 1971).

The Court, upon thorough reconsideration, in light of the current progress of discovery proceedings, finds unwarranted the requested continuance of the previously appointed trial date of March 1, 1976.

Accordingly, plaintiff's Motion for Revision of Procedural Schedule is hereby denied, and pre-trial preparation, pre-trial discovery, and trial upon the merits will proceed in accordance with this Court's Order of January 23, 1976.

IT IS SO ORDERED.

/s/ Robert B. Krupansky
United States District Judge

## APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

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**Civil Action No. C75-560**

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[Filed: September 7, 1978]

CITY OF CLEVELAND,
*Plaintiff,*

*v.*

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *et al.*,
*Defendants.*

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## MEMORANDUM AND ORDER RE DISCOVERY

KRUPANSKY, J.

In preparation for a March 15, 1976 trial date in this cause, the Court, by Order dated March 1, 1976, placed a moratorium on all further discovery proceedings. Subsequent thereto, the March 15, 1976 trial date was continued to accommodate the hearing on plaintiff's Motion for Disqualification of Counsel for defendant, the Cleveland Electric Illuminating Company (CEI). The Motion for Disqualification was denied on August 3, 1976, and thereafter, upon the Motion of plaintiff, the Court issued its September 21, 1976 Order staying further proceedings in this case pending plaintiff's appeal

of the August 3, 1976 Order. Ruling upon plaintiff's appeal on December 12, 1977, the Court of Appeals for the Sixth Circuit affirmed the August 3, 1976 Order of this Court and withheld its mandate until May 15, 1978 to permit plaintiff ample opportunity to pursue and perfect its proposed petition for a writ of certiorari to the Supreme Court of the United States. Notwithstanding this extended period of grace, plaintiff failed to press its appeal to the Supreme Court. Now, there being no further appellate remedies on the issue of disqualification, and there further being no other pending appeals in this case, plaintiff petitions the Court to resume full jurisdiction over this case, remove the September 21, 1976 stay of proceedings, lift its March 1, 1976 moratorium, and permit further discovery before the newly scheduled trial date of February 5, 1979.[1]

Resolution of all outstanding appeals heretofore pending in these proceedings has reinvested this Court with jurisdiction over all aspects of this case. Therefore, the September 21, 1976 stay of proceedings is hereby dissolved and the action is reinstated with a view toward final disposition.

Defendant CEI opposes the plaintiff's motion to set aside the March 1, 1976 moratorium and extend pretrial discovery.

This Court has continuously viewed discovery proceedings in the most liberal light, extending to the adversary parties a wide latitude and access to information and documents purportedly necessary to prepare for trial. Within this context, the Court notes that this proceeding is not of the usual circumstance wherein

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[1] Plaintiff's Motion is styled thusly: "Motion of Plaintiff (1) To Lift Moratorium Order; (2) For Leave to Complete Discovery; and (3) To Stay Trial until such Discovery is Completed".

adversaries confront each other for the first time without full knowledge of the issues, relevant facts, and evidence necessary to plead and litigate their claims. On the contrary, the record reflects that the plaintiff, City of Cleveland, has since as early as May, 1972, continuously litigated substantially identical issues charging CEI and the other defendants to this action with violation of the Sherman and Clayton Antitrust Acts before the Federal Power Commission, the Nuclear Regulatory Commission, the Washington, D.C. Circuit Court of Appeals and this Court. The record fully discloses that the plaintiff has engaged the defendants in extensive and exhaustive discovery during this period of some six years during which countless depositions have been completed and over *TWO AND ONE-HALF MILLION PAGES* of documents have been produced by the defendants. Much of the information and documentation requested and produced for the City in this proceeding have been produced over a period of years in the other parallelling litigation.

While plaintiff has, in the instant proceeding, fairly inundated the defendants with discovery requests including depositions, production of documents, request for stipulations and admissions, the City has demonstrated a calculated lack of diligence to respond to similar requests of the defendants. For example, it was approximately two years in default on February 27, 1978 in filing responses to interrogatories served upon it on January 27, 1976 and February 6, 1976, respectively, by defendants Toledo Edison and Duquesne Light Company.[*] As early as February 14, 1976 this Court had occasion to comment upon the good faith of the

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[*] [This sentence was corrected by a supplemental order filed October 19, 1978, and the corrected language is included herein.]

City of Cleveland in pursuing its discovery in its Order of that date wherein it was stated:

> Moreover, upon careful review of the interrogatories and document requests of plaintiff, in light of defendants' objections to a number of these inquiries, it begins to appear that plaintiff's discovery efforts have not been conducted in absolute good faith. Rather, they manifest plaintiff's entrance upon a deliberate course of harassment in pursuit of dilatory tactics, calculated to overburden the defendants to this action and designed to frustrate the Court in providing the parties with a speedy trial.

*See also* this Court's Order dated January 23, 1976.

The Court of Appeals for the Sixth Circuit has itself recognized in its Order of December 12, 1977 the broad latitude and extensive discovery accorded to the plaintiff during the protracted history of these proceedings. Nonetheless, the plaintiff continues to place before this Court its oft repeated and well worn charges that defendants have ignored plaintiff's discovery demands and that the moratorium has deprived it of needed discovery while the plaintiff deliberately ignores the efforts of its adversaries.

The state of the discovery proceedings in this action exemplifies the absurdity evolving from costly, disorganized, disoriented and aimless floundering of a party overcome and inundated in a morass of irretrievable, misplaced and/or forgotten information and documentation. Typical abuses have prompted the courts, national, state and local bar associations and professional associations to re-examine discovery values and initiate the promulgation of rules designed to correct and minimize these horrendously expensive and often ineffective and questionably motivated practices.

It appearing to the Court that pretrial discovery in this proceeding has been exhausted, the Court, nevertheless, is mindful of unusual circumstances that may warrant additional limited discovery. However, no enlargement or extension of discovery shall be favorably considered until all pending discovery has been completed to the satisfaction of the Court. Failure of any party to respond and/or conclude, in the first instance, any outstanding discovery demands shall preclude that defaulting party from initiating additional discovery and subject such party to appropriate sanctions provided by Rule 37(B), Fed. R. Civ. P.

Limited additional discovery may be initiated by an appropriate party upon written applications to the Court and upon a showing, by clear and convincing evidence, that the information sought is vital to the proceeding and has not already been made available to the petitioning party. The party seeking an extension of discovery shall:

1. particularize the information sought, attest that the information is not available from any other source and specify the efforts expended to develop the information from other sources and explain the reasons for seeking the information at this late date;

2. within the discretion of the Court, all costs of additional authorized discovery, including but not limited to, attorneys fees, manhour costs for developing the information and/or reproduction costs shall be assessed against the moving party.

   (a) The adverse party, immediately upon notice of the scope and nature of the new discovery shall estimate the cost of developing the

information and notify the Court and the moving party thereof;

(b) The moving party shall, before implementing the authorized discovery, deposit with the Clerk of this Court the estimated costs thereof and, upon completion, the adverse party shall be awarded the actual costs incurred therefor. The balance of the deposited funds, if any, shall be returned to the moving party and/or any deficit shall be immediately advanced by such moving party.

Accordingly, IT IS ORDERED that, at this time and within the pronouncements of this Order, the plaintiff's Motion to Dissolve the March 1, 1976 moratorium on discovery is denied.

IT IS SO ORDERED.

/s/ Robert B. Krupansky
United States District Judge

## APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

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**Civil Action No. C75-560**

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[Filed: February 7, 1979]

CITY OF CLEVELAND,
*Plaintiff,*

*v.*

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *et al.*,
*Defendants.*

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## ORDER

KRUPANSKY, J.

Presently before the Court is the City's Motion for reconsideration of the Court's decision of January 27, 1979. Thirty-four days before the February 5, 1979 scheduled trial date of this case, the City filed its Application for Discovery with brief attached wherein it asserted in Section VII thereof:

> IF PLAINTIFF IS DENIED THE DISCOVERY IT SEEKS, PLAINTIFF WILL BE DENIED DUE PROCESS AND ITS RIGHT TO A JURY TRIAL.
>
> As demonstrated hereinabove, the discovery for which plaintiff has applied is important to plaintiff's case preparation and presentation. If plaintiff

is not permitted to obtain the information it seeks, plaintiff will be denied the opportunity of fairly and adequately presenting its case to the jury.

Defendants countered, in substance, that the City's Application for the proposed discovery, filed literally on the eve of trial, was untimely and overly burdensome, charging that the discovery intended was already in the possession of the City and/or available from other sources. Defendants joined issue with the City's 15-day compliance demand by projecting the following time-frames necessary to satisfy the City's request:

1. Toledo Edison—5,072 man hours
2. Ohio Edison—9,739 man hours
3. Duquesne Light—1,342 man hours
4. CEI—no hourly estimate, only a cost of $225,000.00.

On January 27, 1979 in its Opinion, the Court concluded that, apart from the costs and time commitments projected by the defendants, allowances for normal defendant response time, judicial hearings and necessary judicial commitment for consideration and disposition of the preliminary issues of relevancy, materiality, availability and other objections joined by the pleadings, the sheer scope and volume of the demanded discovery and production apparent from the face of the City's Application attested to the unrealistic 15-day schedule imposed by the City for its completion. Moreover, the Court concluded that the demonstrated uncompromising posture of the parties to this action since its inception, as reflected in the record and, most recently, by the vigorous opposition to the City's Application registered by the defendants, was inimical to an early, simple resolution of the merits of plaintiff's discovery Application.

Upon balancing the equities of the City's announced critical need for the requested discovery against the impossibility of ruling on the merits of its Application within the time period imposed by the City, and prior to the February 5, 1979 trial date, the Court, on January 27, 1979, for the fifth time continued the scheduled trial date of this cause to afford the City an opportunity to factually support the allegations of its untimely Application and to pursue further discovery, if warranted.

In its Motion for Reconsideration, the City remonstrates the Court's decision and proclaims its desire for immediate trial in obvious contradiction of its continued insistence to pursue its extensive discovery demands of January 2, 1979.

The City's suggestion to seek its discovery during trial through subpoena duces tecum is no solution to its contradictory demands and offends the most elementary principles of trial practice and procedure. Calculated disruption of a jury trial to consider, resolve and implement, if necessary, forseeably controversial, protracted pretrial discovery issues would constitute an inexcusable imposition upon jurors and pose prejudicial distractions to the continuity and context of the evolving testimony and evidence. The natural consequence of the proposal would reduce to absurdity the entire concept of orderly pretrial preparation insured by the Federal Rules of Civil Procedure.

Upon review of the City's motion for Reconsideration and supporting briefs, the Court finds that the arguments advanced therein are repetitions of the City's contradictory position heretofore urged upon the Court in its Application of January 2, 1979 and totally unsupported by the record of this case.

According the City every consideration to seek and pursue additional discovery, if warranted by the facts and circumstances supporting its Application, and in an effort to provide orderly administration and disposition of all pretrial motions and applications within the mandates of the Federal Rules of Civil Procedure, the Orders of this Court and accepted standards of trial practice and procedure, this Court's Order of January 27, 1979 is affirmed and the City's Motion for Reconsideration is hereby dismissed.

Is Is So Ordered.

/s/ Robert B. Krupansky
United States District Judge

## APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

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**Civil Action No. C75-560**

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[Filed: February 18, 1980]

CITY OF CLEVELAND,
*Plaintiff,*

*v.*

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
*Defendant.*

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## MEMORANDUM AND ORDER

KRUPANSKY, J.

Presently before the Court is plaintiff City of Cleveland's Revised and Supplemented Application for Limited Discovery, as corrected January 21, 1980. Perusal of the City's Application, and the exhibits submitted in support thereof, discloses that the plaintiff currently seeks leave of the Court to conduct additional comprehensive discovery. The contemplated discovery has been denominated by the City as follows:

1) Plaintiff's Revised and Supplemented Third Set of Interrogatories Addressed to Defendant The Cleveland Electric Illuminating Company (Exhibit A);

2) Plaintiff's Revised and Supplemented Third Request for Production of Documents from The Cleveland Electric Illuminating Company (Exhibit B);

3) Plaintiff's Revised and Supplemented Fourth Set of Interrogatories Addressed to All Defendants (Exhibit C);

4) Plaintiff's Revised and Supplemented Fourth Request for Production of Documents from All Defendants (Exhibit D); and

5) Plaintiff's Advance Notice of the Taking of Oral Deposition Testimony (Exhibit E).

Viewed collectively, the City's proposed discovery seeks answers to approximately 51 pages of what would appear to be detailed and highly complex interrogatories and, secondly, the production of a vast array of documentation, the mere description of which spans some 26 pages in the foregoing exhibits. Plaintiff in addition requests permission to depose approximately 52 individuals, the majority of whom, incidentally, were previously deposed in connection with the licensing proceeding before the Nuclear Regulatory Commission.

In light of the voluminous nature of the discovery presently sought, plaintiff concedes that "[t]he granting of the City's discovery requests may necessitate a limited postponement of the [March 10, 1980] trial date." Revised and Supplemented Application for Limited Discovery, at p. 7. This concession parallels the principal basis of defendant CEI's opposition to the instant Application, as CEI strenuously opposes the City's apparent attempt to effectuate, for the sixth time in this protracted litigation, a continuance of the trial of this matter. In this regard, CEI charges, *inter alia*, that the

City has throughout the course of this litigation failed to diligently pursue discovery, and, moreover, that the current request for further discovery, assessed in light of the history of this protracted proceeding, represents yet another dilatory tactic, designed to frustrate defendant's manifest desire for a prompt disposition at trial. CEI urges additionally that the discovery contemplated herein would prove unduly burdensome and costly, as compliance with the City's purportedly "limited" discovery requests would require an estimated expenditure in excess of $300,000, exclusive of attorney fees.[1] *See* Defendant's Supplemental Response to City's Motion for Additional Discovery.

This action was initiated by the filing of plaintiff's Complaint on July 1, 1975. Thereafter, this Court issued a Pre-Trial Order, dated August 5, 1975, which delineated in some detail the time sequence for discovery in this matter. The Order contained the following admonitions:

> "All discovery, including depositions and medical examinations, shall be completed within 120 days,

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[1] CEI's estimate of the anticipated cost of complying with the City's current discovery demands is substantiated by a similar assessment undertaken by the Ohio Edison Company prior to said party's dismissal from the within action of February 7, 1980. While the discovery previously sought of Ohio Edison was markedly less burdensome than that requested of CEI, encompassing in relevant part only two of the four items directed at CEI, *see and compare* Exhibits A, B, C and D to Revised and Supplemented Application for Limited Discovery, Ohio Edison had nonetheless projected that the substantial equivalent of 9,379 man-hours, valued at $120,000, exclusive of attorney fees, would be necessary to adequately respond to the proposed interrogatories and requests for production contained in Exhibits C and D. Memorandum of Ohio Edison Company in Opposition to Revised and Supplemented Application for Limited Discovery, at pp. 3–4.

or extension thereof, after service of the complaint. The fact that motions of any type are pending ruling before the Court shall *not* constitute good cause to suspend, delay or defer discovery proceedings."

* * *

"Extensions of time will not be allowed except upon the showing of good cause, by written motion, to the Court."

* * *

"Upon expiration of the discovery period, cases are subject to *immediate* trial."

* * *

*NOTICE*

"COUNSEL ARE REQUESTED TO DILIGENTLY PURSUE AND COMPLETE DISCOVERY PREPARATORY TO TRIAL WITHIN THE TIME SCHEDULE ASSIGNED BY THE COURT. THE COURT DOES NOT FAVOR LEAVES TO PLEAD AND REQUESTS TO CONTINUE SCHEDULED TRIAL DATES. CONTINUANCES WILL BE GRANTED ONLY UNDER EXTRAORDINARY CIRCUMSTANCES. COUNSEL'S COOPERATION IS SOLICITED."

The instant record discloses that the foregoing admonitions were not observed to any appreciable extent, as the plaintiff neither petitioned the Court for an extension of the period for discovery, as expressly authorized by the Pre-Trial Order, nor pursued any discovery whatsoever during the prescribed 120-day period. *See* Memorandum Opinion of January 23, 1976, at p. 5. On January 7, 1976, however, approximately six and one-half months after the commencement of this action, and 54 days after the expiration of the period allotted for discovery under the Pre-Trial Order, the plaintiff, without leave of Court having been requested or secured, served upon the defendants certain discovery requests,

propounding to defendant CEI in particular approximately 45 pages of interrogatories. *See* Memorandum Opinion of January 23, 1976, at p. 6. Following a hearing on January 12, 1976, wherein the Court specifically directed the litigants' attention to the relevant provisions of its Pre-Trial Order of August 5, 1975, plaintiff, for the first time, formally moved the Court for an extension of the original discovery period. In assessing the plaintiff's motion, this Court undertook an exhaustive review of the record, concluding in part:

> "The Court must assume that the City's failure to pursue discovery pursuant to the Federal Rules of Civil Procedure and the Order of August 5, 1975, resulted from the City's:
>
> 1. Intention not to pursue discovery;
> 2. Failure to read the Court's Order of August 5, 1975;
> 3. Complete disregard of said Order.
>
> The City's failure to initiate and pursue any discovery whatsoever for a period of six and one-half months and, suddenly, 53 days before trial, for the first time serve the defendants with requests for answers to interrogatories does not reflect well upon the City's sincerity and intention to undertake discovery in this case in good faith."

Memorandum Opinion of January 23, 1976, at p. 10. The Court further observed that the parties' completion of exhaustive discovery in connection with administrative proceedings before the Federal Power Commission and the Nuclear Regulatory Commission obviated to a significant extent the necessity for further protracted discovery in the instant litigation, writing:

> "It is conceded by all parties and apparent from the documentation presented that the City has since

> May 1972, continuously litigated before the Federal Power Commission what appears to be substantially identical issues charging CEI and other defendants in this action with violation of the Sherman and Clayton Antitrust Acts. . . . It is equally apparent from the admissions of the parties and the exhibits herein that the City has engaged the defendants in extensive and exhaustive litigation of what appears to be substantially identical issues before the Nuclear Regulatory Commission for a period in excess of a year. . . . Defendants Ohio Edison and Penn Power in a brief filed December 1, 1975, in support of their Motions for Summary Judgment disclosed that the parties in the Nuclear Regulatory Commission case, including the plaintiff, have engaged in extensive discovery involving 63 depositions, comprehensive interrogatories all involving antitrust charges. Requests for production of documents in regard thereto, have over the period of litigation resulted in production of 2.4 million pages of documents for the intervenors, including the plaintiff herein. This statement is not refuted by the City. Moreover, plaintiff had the opportunity to and did engage in exhaustive discovery during the two and one-half plus years that it engaged CEI in litigation involving what appears to be the identical antitrust issues before this Court in the proceeding before the Federal Power Commission styled City of Cleveland v. Cleveland Electric Illuminating, F.P.C. Documents No. E-7631, E-7633 and E-7713."

Memorandum Opinion of January 23, 1976, at pp. 13-14. In view of these findings, the Court refused to continue indefinitely the trial date of March 1, 1976, so as to accommodate further protracted as well as belated discovery. The Court did, however, accede to the City's

request to extend discovery until the scheduled trial date. The Court also directed the defendants to respond promptly to the outstanding interrogatories propounded by the City on January 7, 1976.

The Court's ruling of January 23, 1976, apparently precipitated the plaintiff's motion of February 6, 1976, whereby the City sought a 60-day continuance of the March 1, 1976 trial date as well as an attendant extension of pretrial discovery to March 20, 1976. In its Memorandum and Order of February 14, 1976, the Court, following a detailed and exhaustive review of the litigation to date, was constrained to conclude that the City's motion was without merit. The Court stated in material part:

> "This Court has continuously viewed discovery proceedings in the most liberal light, extending to the adversary parties broad access to information and documents necessary for preparation preliminary to trial. Within this context, the Court notes that this proceeding is not of the usual circumstances wherein adversary parties confront each other for the first time without full knowledge of the issues, relevant facts, and evidence necessary to plead and litigate their claims. On the contrary, the record reflects that the parties have for 3½ years, since at least 1972, engaged in continuous litigation of issues that appear to be identical to those now presented to the Court. As the Court noted in its January 23 Order, the parties have heretofore conducted extensive and exhaustive discovery proceedings in related actions before the Federal Power Commission and the Nuclear Regulatory Commission, involving, *inter alia*, some 63 depositions and production of 2.4 million pages of documents. Much of the information and documentation requested by plaintiff in these

proceedings has already been produced, over a period of years, in these other actions.

While plaintiff has, in the instant proceedings, fairly inundated defendants with interrogatories, requests for production of documents, and requests for stipulations and admissions, it does not appear to respond with equal fervor or diligence to similar requests of defendants. Moreover, upon careful review of the interrogatories and document requests of plaintiff, in light of defendants' objections to a number of these inquiries, it begins to appear that plaintiff's discovery efforts have not been conducted in absolute good faith. Rather, they manifest plaintiff's entrance upon a deliberate course of harassment and pursuit of dilatory tactics, calculated to overburden the defendants to this action and designed to frustrate the Court in providing the parties with a speedy trial."

* * *

"Counsel were clearly advised at the hearing on January 22 and in the Order of January 23 that the Court is resolute in its disapproval of dilatory tactics employed by counsel to effect continuance of trial. From this position, the Court does not waver."

Memorandum and Order of February 14, 1976, at pp. 7-9.

Over the unanimous objection of the defendants, the plaintiff ultimately secured a limited continuance of the aforesaid trial date upon the representation that postponement of trial was necessary to enable the City to adequately review and consider a settlement proposal presented by defendant CEI. In continuing the trial to March 15, 1976, the Court, in an effort to facilitate

orderly pretrial preparation, imposed a moratorium on all new discovery, stating in its Order of March 1, 1976:

> "Commencing March 1, 1976, a moratorium is declared as to all new discovery proceedings. The City shall respond to all defendants' outstanding pleadings and will comply with this Court's Order of January 23, 1976 by not later than March 12, 1976. No further discovery shall be undertaken by any of the parties hereto without first having obtained leave from the Court."

At a March 12, 1976 hearing, the Court was again importuned by the plaintiff to continue the trial date in order to accommodate the settlement negotiations of the parties. While the Court acceded to the City's request, the subsequent "repeated delays and requests for continuances ultimately placed in doubt the portended success of these settlement negotiations." Order of February 17, 1978, at p. 2. Upon the failure of the parties to reach an accord, the Court was constrained to schedule and conduct an evidentiary hearing on the City's Motion to Disqualify legal counsel for defendant CEI. That hearing culminated in this Court's Order of August 3, 1976, denying plaintiff's Motion to Disqualify. Plaintiff thereafter elected to prosecute an immediate appeal of the Court's August 3, 1976 mandate, thereby necessitating a stay of further proceedings in this tribunal. This Court's decree was subsequently affirmed by the Sixth Circuit Court of Appeals on December 12, 1977.

Accordingly, on January 23, 1978, the trial of the plaintiff's substantive antitrust claims was ordered to commence promptly on March 13, 1978. In an apparent reaction to the imminency of trial, the City filed on February 8, 1978, a Motion for Stay of the Proceedings,

whereby the plaintiff sought "to obtain another continuance of the scheduled trial date to a future indefinite date, ostensibly to accommodate final disposition of proceedings before the Nuclear Regulatory Commission". Order of February 17, 1978, at p. 2. Following this Court's refusal of February 17, 1978, to stay its hand pending completion of the NRC proceeding, the plaintiff again sought postponement of the trial date, petitioning the Court on February 23, 1978, for an order (i) lifting the March 1, 1976 moratorium Order; (ii) granting leave to pursue further discovery; and (iii) staying the trial until the completion of said discovery.

Plaintiff's motion of February 23, 1978, filed a mere 18 days in advance of trial, constituted the City's first bona fide attempt to secure from the Court leave to undertake further discovery since the March 1, 1976 moratorium Order. Thus, during the period beginning April 7, 1976[2] and ending with the plaintiff's February 23, 1978 motion, the City, for reasons known only to itself, declined to petition this Court, as expressly permitted by the March 1, 1976 Order, for authority to initiate additional discovery. As this Court stated in its oral Opinion of January 26, 1979, which is incorporated herein and made a part hereto:

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[2]The City filed on April 7, 1976, a pleading styled "Motion of Plaintiff for Conference for Discussion of Plaintiff's Documents and, If Necessary, Scheduling of Additional Discovery Related Thereto", wherein the City merely suggested that "additional discovery may be called for" in the event "important issues cannot be resolved by stipulations, admissions, or Court order". It is apparent from the express language of the foregoing petition that additional discovery was, as of April 7, 1976, a mere contingency which the City did not at that juncture affirmatively seek. Plaintiff's current characterization of the April 7, 1976 motion as one for "additional discovery" is accordingly, as defendant asserts, misleading at best.

"Although the City had avoided seeking the sanction of the Court to pursue additional discovery during the intervening 21 months between April 7, 1976 and the Order of January 23, 1978, rescheduling the trial on March 13, 1978, it predictably reacted by filing, on February 23, 1978, 18 days before the trial date, a redundant motion to lift the conditional moratorium order, to complete discovery and to stay trial pending completion of discovery. . . ."

Tr. 44-45.

Following the plaintiff's motion of February 22, 1978, the City elected on March 3, 1978, to challenge in the United States Supreme Court the Sixth Circuit's order affirming this Court's denial of the aforesaid Motion to Disqualify. Plaintiff similarly resolved on March 17, 1978, to perfect an interlocutory appeal of the aforementioned Order of February 17, 1978, denying the City's Motion for Stay of the Proceedings. In an effort to accommodate the foregoing appellate review, this Court, in its Memorandum and Order of March 24, 1978, was constrained to postpone the trial date of the within action until February 5, 1979.

The City's invocation of the appellate process ultimately proved unsuccessful, as the Supreme Court denied certiorari on the plaintiff's appeal of the disqualification order on April 24, 1978, and the Sixth Circuit dismissed the City's interlocutory appeal on August 4, 1978. Plaintiff's appellate remedies having been exhausted, the Court, by Memorandum and Order of September 7, 1978, undertook to consider the City's discovery requests of February 22, 1978. After reviewing in some detail the nature and extent of the discovery undertaken by the parties in the course of the aforementioned administrative proceedings, the Court stated:

"The Court of Appeals for the Sixth Circuit has itself recognized in its Order of December 12, 1977 the broad latitude and extensive discovery accorded to the plaintiff during the protracted history of these proceedings. Nonetheless, the plaintiff continues to place before this Court its oft repeated and well worn charges that defendants have ignored plaintiff's discovery demands and that the moratorium has deprived it of needed discovery while the plaintiff deliberately ignores the efforts of its adversaries.

The state of the discovery proceedings in this action exemplifies the absurdity evolving from costly, disorganized, disoriented and aimless floundering of a party overcome and inundated in a morass of irretrievable, misplaced and/or forgotten information and documentation. Typical abuses have prompted the courts, national, state and local bar associations and professional associations to re-examine discovery values and initiate the promulgation of rules designed to correct and minimize these horrendously expensive and often ineffective and questionably motivated practices.

It appearing to the Court that pretrial discovery in this proceeding has been exhausted, the Court, nevertheless, is mindful of unusual circumstances that may warrant additional limited discovery. However, *no enlargement or extension of discovery shall be favorably considered until all pending discovery has been completed to the satisfaction of the Court. Failure of any party to respond and/or conclude, in the first instance, any outstanding discovery demands shall preclude that defaulting party from initiating additional discovery* and subject such party to appropriate sanctions provided by Rule 37(B), Fed. R. Civ. P.

> Limited additional discovery may be initiated by an appropriate party upon written applications to the Court and upon a showing, by clear and convincing evidence, that the information sought is vital to the proceeding and has not already been made available to the petitioning party. The party seeking an extension of discovery shall:
>
> 1. particularize the information sought, attest that the information is not available from any other source and specify the efforts expended to develop the information from other sources and explain the reasons for seeking the information at this late date"

Memorandum and Order of September 7, 1978, at pp. 3-4 (emphasis supplied).

During the period beginning March, 1978 and concluding in early January, 1979, while the trial of the plaintiff's antitrust claims was effectively stayed by the foregoing appellate proceedings, the City once again declined to petition the Court, as authorized by the discovery Order of March 1, 1976, as reaffirmed by the Court's Order of September 7, 1978, for leave to pursue additional discovery. Consistent with the City's past practices, however, plaintiff eventually sought exhaustive additional discovery, filing its Application therefor on January 2, 1979, a mere 34 days before the scheduled February 5, 1979 trial date. On January 27, 1979, the Court, upon consideration of the City's Application, issued its oral Opinion, which was thereafter reaffirmed in this tribunal's written Orders of February 7, 1979 and February 9, 1979. In its initial ruling of January 27, 1979, the Court, after a comprehensive review of the instant record in its entirety, entered the following findings:

"1. the City has consistently failed to diligently pursue discovery during periods when trial of the antitrust claims was effectively stayed by higher Court order;

2. the City has, on each occasion when confronted with impending trial of the antitrust claims, employed the tactics of initiating untimely discovery proceedings immediately before the scheduled commencement of the trial;

3. the City has advanced substantially the same arguments in support of its previous efforts as are presently thrust upon the Court in support of its pending application;

4. the Court has scheduled seven weeks for the trial of this action and is prepared to proceed;

5. the City has been afforded a broad latitude to pursue orderly discovery;

6. the City has, in fact, conducted exhaustive discovery, since as early as May of 1972, during its continuous litigation, of substantially identical issues, charging CEI and the other Defendants to this action with violations of the Sherman and Clayton Antitrust Acts before the F.P.C., the N.R.C., the Washington, D.C., Circuit Court of Appeals, and this Court.

During this period of approximately six years, two and a half million pages of documents have been produced by the Defendants, and over 63 depositions have been completed;

7. the Defendants have stated that they are prepared to proceed to trial;

8. the City has been less than diligent in pursuing orderly pre-trial discovery;

9. the City's arguments and representations in support of its application are contradicted by the record in these proceedings.

The Court therefore concludes that further discovery may be justifiably foreclosed in this action."

Tr. 50-52. In spite of the foregoing conclusion, and the findings attendant thereto, the Court, according the City every benefit of doubt, continued the trial date for the fifth time so as to afford the City every opportunity to pursue meaningful warranted discovery. *See* Tr. 52. This pronouncement was expressly reiterated in the Court's subsequent Order of February 7, 1979, wherein the Court, in denying plaintiff's Motion for Reconsideration, stated:

"Upon balancing the equities of the City's announced critical need for the requested discovery against the impossibility of ruling on the merits of its Application within the time period imposed by the City, and prior to the February 5, 1979 trial date, the Court, on January 27, 1979, for the fifth time continued the scheduled trial date of this cause to afford the City an opportunity to factually support the allegations of its untimely Application and to pursue further discovery if warranted."

* * *

"According the City every consideration to seek and pursue additional discovery, if warranted by the facts and circumstances supporting its Application, and in an effort to provide orderly administration and disposition of all pretrial motions and applications within the mandates of the Federal Rules of Civil Procedure, the Orders of this Court and accepted standards of trial practice and procedure, this Court's Order of January 27, 1979 is affirmed

and the City's Motion for Reconsideration is hereby dismissed."

Order of February 7, 1979, at pp. 2-3.

In accordance with the mandate of September 7, 1978, stating in pertinent part that "no enlargement or extension of discovery shall be favorably considered until all pending discovery has been completed to the satisfaction of the Court", the Court, by notice of March 8, 1979, advised the litigants that hearings on the City's January 2, 1979 Application for additional discovery would be undertaken "upon notification by the parties . . . that all outstanding discovery has been completed to the satisfaction of the parties and in compliance with the orders of the Court". This Court's notice of March 8, 1979, was followed by the City's "Status Report in re Plaintiff's January 2, 1979 Application for Limited Discovery", filed March 30, 1979, wherein the City specifically disavowed its readiness to proceed with the contemplated discovery hearings. After suggesting to the Court "that no hearing on plaintiff's application for limited discovery should be scheduled prior to the week of May 7, 1979", the City proceeded to represent:

"The City hopes that by such meetings some or all of the discovery it has sought can be obtained without the need for a hearing. If the meetings do not produce the anticipated informal cooperation sought by the City, the City will then seek to have a hearing on its Application".

Status Report, at p. 3.

Plaintiff ultimately elected to forego the opportunity to factually support the allegations of its January 2, 1979 Application, initially extended by this Court on January 27, 1979 and reiterated on several occasions thereafter, until January 16, 1980, when the City sub-

mitted its Revised and Supplemented Application for Limited Discovery, which is here in issue. Predictably enough, the latter Application was tendered only after this Court, by Memorandum and Order of January 15, 1980, set the trial of this matter for March 10, 1980. In the course of the aforesaid Memorandum and Order, this Court had occasion to comment upon the plaintiff's rather conspicuous failure to pursue with any appreciable diligence its professed critical need of additional discovery during the period January 27, 1979, through January 15, 1980:

> "During the intervening period of nearly a year's duration, this Court, pursuant to its notice of March 8, 1979, advising the litigant that hearings on the City's request for additional discovery would be undertaken 'upon notification by the parties . . . that all outstanding discovery has been completed to the satisfaction of the parties and in compliance with the orders of the Court', has patiently awaited the City's satisfaction of the foregoing prerequisites to additional discovery. To the best of the Court's knowledge, the City has yet to demonstrate its compliance with the foregoing requirements or its readiness to otherwise proceed on its January 2, 1979 Application for further discovery."

In response to this language, and in accordance with this Court's mandate of September 7, 1978, conditioning the availability of further discovery upon, *inter alia*, the moving party's compliance with the requirement that such litigant adequately "explain the reasons for seeking the information at this late date", plaintiff currently urges that its failure to initiate further discovery proceedings pursuant to this Court's pronouncements of January 27, 1979 and February 7, 1979, was attributable

solely to the conduct of then defendant Duquesne Light in conjunction with the assertedly overly restrictive conditions imposed upon the pursuit of new discovery by this tribunal's prior decrees. Plaintiff thus maintains that "the City was prevented, by the continued complaints of Duquesne Light and by this Court's Orders, from satisfying the preconditions to discovery which this Court established in its September [7], 1978 Order." Revised and Supplemented Application for Limited Discovery, at p. 6. A review of the instant record, however, discloses with unmistakable clarity that the City's asserted justification is both disingenuous and entirely unpersuasive. The following chronology is instructive.

On February 9, 1976, Duquesne Light propounded to the City an initial set of interrogatories. *More than two years later,* the plaintiff, on February 27, 1978, submitted answers and objections thereto, opposing in relevant part interrogatory no. 76, which sought disclosure of information central to the issue of damages.

Following the Court's mandate of September 7, 1978, establishing as a prerequisite to the initiation of further discovery the completion of all outstanding demands, the Court considered and found meritorious a motion of Duquesne Light to compel answers to interrogatory no. 76, issuing its Memorandum and Order on February 6, 1979. Approximately one month later, the City, on March 9, 1979, submitted a supplementary answer to the aforesaid interrogatory. The inadequacy of the plaintiff's March 9, 1979 response necessitated a second motion to compel, which was filed on May 25, 1979, following the failure of various attempts at informal resolution. In granting the foregoing motion, the Court in its Memorandum and Order of August 10, 1979, observed:

> "Comparison of the City's March 9, 1979 supplemental answers with the allegations contained in paragraphs 39 through 49, inclusive, of the City's Complaint, which was filed July 1, 1975, discloses that the answers to the interrogatory in issue are a mere restatement of the four-year-old claims and that the factual bases thereof remain undisclosed. The City's answers to subparagraphs a. and c. of interrogatory 76, for example, are devoid of specificity and are prolix restatements of paragraph 42 of its Complaint."
>
> * * *
>
> "As held by the Court in its February 6, 1979 Memorandum and Order, facts relating to the issue of damages are relevant and discoverable. Moreover, written reports of the City's expert witnesses, delivered to opposing counsel on July 16, 1979, disclose that the City possesses sufficient information to answer with particularity Duquesne's interrogatory no. 76."

Memorandum and Order of August 10, 1979, at pp. 5-6.

While obligated as of August 10, 1979, to frame adequate and responsive answers to the aforesaid interrogatory, and possessed of the requisite data to do so as of July 16, 1979, the City ultimately delayed submitting its second supplementary answer until November 6, 1979, some 87 days after the issuance of the August 10, 1979 decree. Following the belated responses of November 6, 1979, an additional 71 days elapsed before the plaintiff, again confronted with an impending trial date, filed its January 16, 1980 Revised and Supplemented Application for Limited Discovery.

It is readily apparent from the foregoing chronology that the plaintiff's reliance upon what it disingenuously characterizes as the "continued complaints" of Duquesne

Light to justify its own failure to timely initiate further discovery proceedings pursuant to this Court's Orders of January 27, 1979 and February 7, 1979, is utterly without foundation. In view of the circumstances prevailing herein, the suggestion that the aforementioned delay of nearly a year's duration is primarily and ultimately attributable to the insistence of Duquesne Light upon responsive answers to perfectly proper interrogatories rather than the City's own protracted delay in providing the same is neither persuasive nor convincing. Contrary to the plaintiff's contentions, the instant record discloses in a convincing manner that the City's inability to satisfy the prescribed conditions to the pursuit of additional discovery prior to November 6, 1979, was occasioned in the final analysis, by the plaintiff's own repeated failures to frame, in a timely fashion, adequate responses to altogether legitimate discovery demands of Duquesne Light.

The Court would observe additionally that the plaintiff's lack of due diligence herein is further evidenced by the City's failure to affirmatively undertake any action on its proclaimed critical discovery needs during the 71-day period beginning November 6, 1979, and ending January 15, 1980, despite the compliance at that time with the prerequisite of September 7, 1978 that outstanding discovery be completed. In view of the plaintiff's inactivity during this interval, the instant Application, filed in the immediate aftermath of this Court's Order of January 15, 1980, scheduling the trial of this action for March 10, 1980, has every appearance of a dilatory tactic proffered to effect yet another continuance of trial.

It is axiomatic that a district court may properly exercise broad discretion in discovery matters. *Kyle*

*Engineering Company v. Kleppe*, 600 F.2d 226 (9th Cir. 1979); *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124 (5th Cir. 1976). As stated by the Eighth Circuit Court of Appeals in *Voegeli v. Lewis*, 568 F.2d 89, 96 (8th Cir. 1977), and reiterated in *Phil Crowley Steel Corp. v. Macomber Inc.*, 601 F.2d 342, 344 (8th Cir. 1979):

> "A district court has very wide discretion in handling pretrial discovery and we are most unlikely to fault its judgment unless, in the totality of the circumstances, its rulings are seen to be a gross abuse of discretion resulting in fundamental unfairness in the trial of the case."

The federal courts have consistently employed this broad discretion to facilitate the orderly and expeditious resolution of legal controversies, and to safeguard litigants from the dilatory practices of their opponents. *See e.g. Tennessee Electric Power Company v. Tennessee Valley Authority*, 306 U.S. 118, 145, 59 S. Ct. 366, 373 (1939); *United States v. 412.93 Acres of Land*, 455 F.2d 1242, 1246 (3d Cir. 1972); *Bonnell v. Commonwealth Realty Trust*, 63 F.R.D. 616, 617-18 (E.D. Pa. 1974); *Glesenkamp v. Nationwide Mutual Insurance Co.*, 71 F.R.D. 1, 3 (N.D. Cal. 1974).

Applying these firmly established principles, the Court is constrained to conclude that the defendant's objections to the plaintiff's untimely request for additional discovery are well-founded. The Court, having undertaken an exhaustive review of the instant record, is compelled to conclude, as the defendant charges, that the City has failed to diligently pursue its discovery obligations throughout the course of this litigation. The Court would observe, moreover, that the current Application, assessed in light of the history of this protracted proceeding, could be construed as constituting a dilatory tactic as the defendant has alleged.

This Court, in its Order of January 27, 1979, liberally extended to the City the opportunity to support factually the allegations of its unseasonable discovery Application of January 2, 1979. In characteristic fashion, the plaintiff responded, initially by unduly prolonging the completion of outstanding discovery, as hereinbefore described, and thereafter, by delaying any affirmative action on its proclaimed discovery needs until after this Court scheduled the trial date of this matter. In view of these circumstances, and in light of the protracted history of this proceeding, this Court cannot now sanction, over the defendant's strenuous objection, the untimely pursuit of additional discovery, and thereby effect, for the sixth time in this lengthy litigation, a continuance of trial. The Court accordingly reaffirms its pronouncement of January 15, 1980 that "justice dictates that the within action proceed to trial forthwith."

In accordance with the foregoing, the plaintiff's Revised and Supplemented Application for Limited Discovery is hereby denied in its entirety. The trial of this matter shall commence promptly on March 10, 1980, at 10:00 a.m., as previously ordered.

IT IS SO ORDERED.

/s/ Robert B. Krupansky
United States District Judge

## APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

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**Civil Action No. C75-560**

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[Filed: March 8, 1980]

CITY OF CLEVELAND,
*Plaintiff,*

*v.*

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
*Defendant.*

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## MEMORANDUM AND ORDER

KRUPANSKY, J.

This matter is presently before the Court on the plaintiff City of Cleveland's motion to disqualify the Honorable Robert B. Krupansky pursuant to the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the provisions of 28 U.S.C. § 455 (Supp. 1979). Defendant Cleveland Electric Illuminating Company has responded in opposition.

A review of the applicable authorities discloses that this tribunal has an affirmative obligation to assess in the first instance the legal sufficiency of the motion at bar and the underlying supporting affidavits. *Albert v.*

*United States District Court for the Western District of Michigan,* 283 F.2d 61, 62 (6th Cir. 1960), *cert. denied,* 365 U.S. 828, 81 S. Ct. 713 (1961); *United States v. Bray,* 546 F.2d 851, 857 (10th Cir. 1976); *Davis v. Board of School Commissioners of Mobile County,* 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied,* 425 U.S. 944, 96 S. Ct. 1685 (1976 ; *Hayes v. National Football League,* 463 F. Supp. 1174, 1178 (C.D. Cal. 1979); *Hawaii-Pacific Venture Capital Corp. v. Rothbard,* 437 F. Supp. 230, 236 (D. Hawaii), *appeal dismissed,* 564 F.2d 1343 (9th Cir. 1977). As properly stated by the Tenth Circuit Court of Appeals in *United States v. Olander,* 584 F.2d 876, 883 (10th Cir. 1978):

> It was not improper for Judge Boldt to pass on the motion to disqualify. The law is clear that he must determine whether the affidavit is sufficient, if true, to require that he recuse himself. Only if he finds it thus sufficient is he required to have another judge hear the motion.

*See United States v. Azhocar,* 581 F.2d 735, 738-39 (10th Cir. 1978), *cert. denied,* 440 U.S. 907, 99 S. Ct. 1213 (1979); *United States v. Haldeman,* 559 F.2d 31, 131 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933, 97 S. Ct. 2641 (1977).

In addition to imposing upon the trial court the nondelegable duty of passing on the legal sufficiency of a disqualification request, existing legal precedent counsels that a "trial judge has as much obligation not to recuse himself when there is no reason to do so as he does to recuse himself when the converse is true."[1]

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[1]This is not to imply that this Court adheres to the so-called "duty to sit" principles which obtained in the federal judiciary prior to the 1974 enactment of new section 28 U.S.C. § 455, upon which the plaintiff largely predicates the instant motion. The

[footnote continued]

*United States v. Bray, supra,* 546 F.2d at 857. *Accord: In re Union Leader Corp.,* 292 F.2d 381, 391 (1st Cir.), *cert. denied,* 368 U.S. 927, 82 S. Ct. 361 (1961); *Wolfson v. Palmieri,* 396 F.2d 121, 124 (2d Cir. 1968); *Smith v. Danyo,* 441 F. Supp. 175 (M.D. Pa. 1977), *aff'd,* 585 F.2d 83 (3d Cir. 1978); *Andrews, Mosburg, Davis, Elam & Bixler, Inc. v. General Insurance Company of America,* 418 F. Supp. 304, 307 (W.D. Okla. 1976). Underlying this obligation is the recognition that "the granting of a motion to recuse necessarily results in a waste of the judicial resources which have already been invested in the proceeding." *In re International Business Machines Corp.,* ___ F.2d ___, Case No. 79-3070 (2d Cir. Feb. 25, 1980), slip op. at 1431. Thus, disqualification is not favored in instances where, as here, a single judge has acquired by experience, familiarity with a protracted, involved case which could not easily be passed on to a second judge.[2] *Bradley v. School Board of City of*

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Court is fully cognizant of the fact that new section 455 was expressly intended by its drafters to abrogate the "duty to sit" doctrine. S. Rep. No. 93-419, 93d Cong., 1st Sess., 1973, p. 5; H. Rep. No. 93-1453, 93d Cong., 2d Sess., reprinted in U.S. Code Cong. & Admin. News, pp. 6351, 6355 (1974). Nonetheless, it can be said that a district judge continues to have "an obligation to the parties in a case, and to his fellow judges, not to recuse himself *when valid grounds are not raised.*" *W. Clay Jackson Enterprises, Inc. v. Greyhound Leasing & Financial Corp.,* 467 F. Supp. 801, 803 (D.P.R. 1979) (emphasis supplied). In this limited sense, a somewhat circumscribed "duty to sit" remains. *Blizard v. Frechette,* 601 F.2d 1217, 1220-21 (1st Cir. 1979), *aff'g Blizard v. Fielding,* 454 F. Supp. 318 (D. Mass. 1978).

[2]A review of the instant record discloses that in the course of these proceedings this Court has conducted approximately twenty-three hearings, issued eighty-two written orders, and prepared an additional forty-one written memorandum orders. It should also be noted that plaintiff herein has sought extensive appellate review, prosecuting appeals from this Court's decrees on five separate occasions, one of which culminated in the City's

[footnote continued]

*Richmond, Virginia,* 324 F. Supp. 439, 449 (E.D. Va. 1971). As stated by the Second Circuit Court of Appeals:

> The mere filing of an affidavit of prejudice does not require a judge to recuse himself. On the contrary, we have held that a judge has an affirmative duty to inquire into the legal sufficiency of such an affidavit and not to disqualify himself unnecessarily, particularly "where the request for disqualification was not made at the threshold of the litigation and the judge has acquired a valuable background of experience." *Rosen v. Sugarman,* 357 F.2d 794, 797-98 (2d Cir. 1966).

*National Auto Brokers v. General Motors Corp.,* 572 F.2d 953, 958 (2d Cir. 1978), *cert. denied,* 439 U.S. 1072, 99 S. Ct. 844 (1979). *Cf. Kelley v. Metropolitan County Board of Education,* 479 F.2d 810, 811 n.1 (6th Cir. 1973).

In support of the instant motion, plaintiff has submitted for the Court's consideration a total of eight affidavits, five of which are testimonials of individuals who have provided or who currently provide the plaintiff with legal representation in the within action.[3] The remaining affiants, Robert H. Holden and David T. Abbott, are former reporters for the Cleveland Plain Dealer who apparently had occasion to observe certain proceedings in the instant cause.

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unsuccessful petition to the United States Supreme Court for certiorari. Incidentally, of the foregoing appeals, three have resulted in this Court being sustained on the merits, a fourth dismissed as improvident pursuant to Rule 8, Rules of the Sixth Circuit, and a fifth dismissed pursuant to the stipulation of the parties. In no instance has a mandate from this tribunal been reversed or otherwise modified on appeal.

[3]A sixth affiant, William A. LeFaiver, is an associate of the law firm currently representing the City herein, Hahn, Loeser, Freedheim, Dean & Wellman.

In assessing the affidavits, the Court observes that for purposes of the present inquiry, "all facts stated with particularity are to be taken as true." *United States v. Haldeman, supra,* 559 F.2d at 131. However, "[a]ssertions merely of a conclusionary nature are not enough, nor are opinions or rumors." *Id.* at 134 (footnotes omitted). *Accord: United States v. Bray, supra,* 546 F.2d at 857; *United States v. Corr,* 434 F. Supp. 408, 412-13 (S.D.N.Y. 1977); *Smith v. Danyo, supra,* 441 F. Supp. at 175; *Hayes v. National Football League, supra,* 463 F. Supp. at 1179. Thus, in order for an affidavit to be sufficient, "specific facts and reasons must be laid out; conclusory allegations and speculations are not sufficient." *Hawaii-Pacific Venture Capital Corp. v. Rothbard, supra,* 437 F. Supp. at 234. *See Sperry Rand Corp. v. Bentronix, Inc.,* 403 F. Supp. 367, 371-372 (E.D. Pa. 1975).

An appraisal of the submissions under the foregoing principles discloses that the essential thrust of the plaintiff's motion is that the attitude, demeanor, rulings and other written opinions of the Court infer ". . . that the impartiality of the Honorable Robert B. Krupansky toward the City of Cleveland may reasonably be questioned". *Plaintiff's Motion for Disqualification.* Plaintiff charges in this regard that the City has been subjected throughout the course of these proceedings to a disproportionate number of adverse and allegedly erroneous rulings, many of which have pertained to the pursuit of pretrial discovery. Plaintiff further predicates the motion at bar upon the impressions and perceptions of a number of the aforesaid affiants who, having observed or participated in various judicial proceedings undertaken in connection with the instant action, maintain that the Court's general demeanor evidences a clear appearance

of partiality. Plaintiff accordingly urges that disqualification herein is warranted in order to preserve said party's constitutional right to a fair trial and to comport with the mandate of 28 U.S.C. § 455(a) (Supp. 1979), which provides in relevant part as follows:

> Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

To properly assess the legal sufficiency of the instant motion under § 455, it is incumbent upon the Court, for the reasons developed more fully below, to examine a concomitant provision, 28 U.S.C. § 144, and the judicial constructions thereunder. This statute provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144. Section 144 explicitly requires that a motion for recusal must be timely made. In addition, the statutory provision has been authoritatively construed to mandate disqualification only where the prejudice or bias in question is attributable to an extrajudicial source. As stated by the Supreme Court in *United States v.*

*Grinnell Corp.*, 384 U.S. 563, 583, 86 S. Ct. 1698, 1710 (1966):

> The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. Berger v. United States, 255 U.S. 22, 31, 41 S. Ct. 230, 232, 65 L. Ed. 481.

*Accord: United States v. Azhocar, supra,* 581 F.2d at 739; *Smith v. Danyo, supra,* 585 F.2d at 87; *United States v. Bray, supra,* 546 F.2d at 859. *See Ex Parte American Steel Barrel Co.*, 230 U.S. 35, 43-44, 33 S. Ct. 1007, 1010 (1913).

The applicability of the foregoing principles to new section 455 has become increasingly apparent. Recent authorities considering the relationship between sections 144 and 455 have determined, upon reviewing the pertinent legislative history, that these related provisions must be construed *in pari materia. Davis v. Board of School Commissioners, supra,* 517 F.2d at 1051-52; *United States v. Olander, supra,* 584 F.2d at 882; *United States v. Carignan,* 600 F.2d 762, 763-64 (9th Cir. 1979); *In re International Business Machines Corp., supra,* slip op. at 1419; *Hawaii-Pacific Venture Capital Corp. v. Rothbard, supra,* 437 F. Supp. at 233. *See Hepperle v. Johnston,* 590 F.2d 609, 613-14 (5th Cir. 1979); *Lazofsky v. Sommerset Bus Company, Inc.*, 389 F. Supp. 1041, 1044-45 (E.D.N.Y. 1975). Of particular significance to the instant controversy, recent case authorities have specifically concluded that disqualification under section 455(a) must be predicated as previously under section 144, upon extrajudicial rather than judicial conduct. A review of the applicable authorities is instructive.

The seminal case addressing the issue of the proper relationship between the aforesaid concomitant provisions is the Fifth Circuit Court of Appeals' opinion in *Davis v. Board of School Commissioners, supra.* Therein, the Court of Appeals reasoned:

> The quoted language, *supra,* in § 455 is new to the federal law of disqualification and we must determine whether Congress intended to overrule the gloss placed on § 144, and impliedly on § 455, by court decisions that it applies only to conduct which runs against a party and not the lawyer, *cf. United States ex rel. Wilson v. Coughlin, supra,* at 104; *Geibe v. Pence, supra* at 943; *see also,* Annot., 23 A.L.R. 3d 1416; and that disqualification results from extra-judicial conduct rather than from matters arising in a judicial context. [citations omitted].
>
> We find no suggestion in the legislative history that these decisions were being overruled or in anywise eroded. The new language was designed to substitute the reasonable factual basis-reasonable man test in determining disqualification for the subjective "in the opinion of the judge" test in use prior to the amendment. *Cf. Kinnear-Weed Corp. v. Humble Oil & Refining Corp.*, 5th Cir. 1971, 441 F.2d 631, 635. It was also intended to overrule the so-called duty to sit decisions. *See Edwards v. United States,* 5th Cir., 1964, 334 F.2d 360. The abuse of sound judicial discretion test continues to obtain on appellate review. H. Rep. No. 93-1453, 1974 U.S. Code Cong. & Admin. News pp. 6351, 6355.
>
> Construing §§ 144 and 455 *in pari materia* we believe that the test is the same under both. We thus hold that an appellate court, in passing on questions of disqualification of the type here

> presented, should determine the disqualification on the basis of conduct which shows bias or prejudice or lack of impartiality by focusing on a party rather than counsel. The determination should also be made on the basis of conduct extra-judicial in nature as distinguished from conduct within a judicial context. This means that we give §§ 144 and 455 the same meaning legally for these purposes, whether for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned.

*Davis v. Board of School Commissioners, supra,* 517 F.2d at 1052. The Fifth Circuit's construction of 455(a) enunciated in *Davis* was expressly approved by the District of Columbia Circuit Court of Appeals, writing in *United States v. Haldeman, supra,* 559 F.2d at 132-33 n.297:

> For a long time before enactment of new § 455(a) in 1974, the judicial understanding of § 144 and old § 455 was that they were to be confined in operation to extrajudicial conduct or conditions. *See* note 296 *supra* and accompanying text. Nothing we have observed in the legislative history of new § 455(a) suggests that this construction was to be overturned. The Fifth Circuit has concluded that new § 455(a) is to be similarly interpreted, *Davis v. Board of School Comm'rs,* 517 F.2d 1044, 1052 (5th Cir. 1975). Absent clearer guidance as to the congressional intent, we agree . . . .

The Court of Appeals in *Haldeman* also observed that the requirement that disqualification be premised upon partiality emanating from an extrajudicial source was supported by compelling policy considerations:

> Most of the activities relied upon were exercises of judicial functions. Viewed in their individual

contexts, we do not consider them improper when they occurred, nor is it argued that they were. Should the appearance-of-impropriety standard be woodenly applied to work a judge's disqualification because of earlier legal adjudications entirely proper when made, the result would be truly amazing. As one judge has stated,

> [i]f the words "impartiality might reasonably be questioned" and "avoid impropriety and the appearance of impartiality" were to be interpreted to encompass judicial rulings in the course of a trial or other proceeding, . . . then there would be almost no limit to disqualification motions and the way would be opened to a return to "judge shopping", a practice which has been for the most part universally condemned. Certainly every ruling on an arguable point during a proceeding may give "the appearance of" partiality, in the broadest sense of those terms, to one party or the other.

*Lazofsky v. Sommerset Bus Co.*, 389 F. Supp. 1041, 1044 (E.D.N.Y. 1975) . . . .

> The appearance-of-impropriety standard in terms summons a disqualification, not merely when the judge's impartiality might somehow be questioned, but only when it may reasonable be questioned. We think reasonableness of the challenge must take due account of the effect which its acceptance will have on the judicial process. So drastic would be the impact that we are unwilling to ascribe to ethical and legislative formulators of the standard a purpose to direct it toward judicial rulings on questions of law.

*United States v. Haldeman*, 559 F.2d at 133, n.297.

The most recent pronouncement on the subject is the Second Circuit Court of Appeals' well-reasoned opinion in *In re International Business Machines Corp., supra,* wherein the Court of Appeals wrote:

> Section 455(b) lists five instances which mandate the recusal of a judge. The only relevant subdivision is section 455(b)(1), which requires recusal where the judge "has a personal bias or prejudice concerning a party. . . ." This language is taken directly from section 144. We agree with the Fifth Circuit's holding in *Davis v. Board of School Commissioners,* 517 F.2d 1044, 1052 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976), that, "[c]onstruing §§ 144 and 455 *in pari materia* we believe the test is the same under both. . . . The determination should be made on the basis of conduct extrajudicial in nature as distinguished from conduct within a judicial context." . . .
>
> IBM urges that disqualification is also required under section 455(a). Section 455(a) provides for recusal where the judge's "impartiality might reasonably be questioned." This section sets up an objective standard for recusal, creating the so-called "appearance of justice" rule. . . . However, we cannot agree that adverse rulings by a judge can per se create the appearance of bias under section 455(a). A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias. Judicial independence cannot be subservient to a statistical study of the calls he has made during the contest. As Mr. Justice Frankfurter noted in *Wilkerson v. McCarthy,* 336 U.S. 53, 65 (1949) (Frankfurter, J., concurring). "A timid judge, like a biased judge, is intrinsically a lawless judge."

> We conclude that under section 455(a) the bias to be established must be extrajudicial and not based upon in-court rulings.

*In re International Business Machines Corp.*, slip op. at 1418-21 (footnotes omitted). *Accord: Hepperle v. Johnston, supra,* 590 F.2d at 614; *Hawaii-Pacific Venture Capital Corp. v. Rothbard, supra,* 437 F. Supp. at 233-34.

The appellate determination in the IBM litigation is of particular relevance to the instant controversy, as the substantive charges of bias advanced in support of the motion to disqualify Chief Judge Edelstein in that proceeding closely resemble the allegations presented herein. The specific charges therein were summarized by the Second Circuit as follows:

1) The Chief Judge has become an advocate for the plaintiff, disrupting the direct testimony of IBM's witnesses, cross-examining IBM witnesses himself, shielding plaintiff's witnesses from cross-examination, and routinely abusing IBM's witnesses and counsel.

2) His rulings on questions of evidence, procedure and discovery have been inconsistent and the general conduct of the trial has been in favor of the Government and against law.

3) He has expressed an antipathy toward IBM counsel which manifests an attitude that they can do no right.

4) He has deliberately attempted to create a record that cannot be subject to full and adequate appellate review by refusing to file papers submitted by IBM, refusing to hand down timely rulings in matters of importance to IBM, and secretly making alterations in and deletions from the trial transcript.

*In re International Business Machines Corp.*, slip op. at 1416-17. IBM sought to support the foregoing contentions by adducing statistical proof purporting to demonstrate "that 86% of the some 10,000 oral motions made and 74 out of 79 written motions have been decided against the petitioner and in favor of the Government." *Id.*, slip op. at 1421. The Court of Appeals found such statistical evidence entirely unpersuasive, stating in pertinent part:

> It seems evident that statistics alone, no matter how computed, cannot establish extrajudicial bias. There is no authority for, and no logic in, assuming either party to a litigation is entitled to a certain percentage of favorable decisions.

*Id.*, slip op. at 1422.

More fundamentally, the Second Circuit affirmatively found that the petitioner failed to sustain its burden of demonstrating the existence of the requisite extrajudicial animus, stating in part:

> IBM has not shown and does not purport to establish or identify any personal connection, relationship or extrajudicial incident which accounts for the alleged personal animus of the trial judge. IBM's claim of prejudice is based completely on Chief Judge Edelstein's conduct and rulings in the case at hand. These we have repeatedly held form no basis for a finding of extrajudicial bias. Thus in *King v. United States*, 576 F.2d 432, 437 (2d Cir. 1978), we stated:
>
> > "The grounds urged for disqualification are for the most part rulings made by (the trial judge) during the trial or statements made by him in the course of his judicial duties. . . . Nothing of this kind, what the judge has learned from or done in the proceeding before him, is any

> basis for disqualification; to be sufficient for disqualification the alleged bias or prejudice must be from an extrajudicial source."

*In re International Business Machines Corp.*, slip op. at 1419-20.

Accordingly, the Court of Appeals was constrained to conclude that "the rulings and conduct of the trial judge complained of here are legally insufficient to warrant recusal under Title 28, §§ 144, 455 or under the due process clause of the Fifth Amendment of the United States Constitution." *In re International Business Machines Corp.*, slip op. at 1428.

Applying the foregoing principles, this Court, upon a careful review of the record, is similarly constrained to conclude that the instant motion, as supported by the aforementioned affidavits, fails to present legally sufficient grounds for disqualification. A review of the record in its entirety discloses that plaintiff's moving papers are entirely devoid of specific factual allegations which even suggest, much less demonstrate, that the Court's alleged partiality emanates from an extrajudicial source. To the contrary, the instant motion is predicated entirely upon conduct undertaken in a purely judicial context. Accepting, *arguendo*, as true the plaintiff's charges that the City has been subjected to a disproportionate number of adverse and erroneous rulings; that this Court has, to the plaintiff's detriment, mismanaged pretrial discovery;[4] and that this tribunal's courtroom

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[4] It is beyond peradventure that it is the duty of the trial judge to supervise, manage and control pretrial discovery, for he is the single individual who, in the exercise of this purely judicial discipline, can do so effectively. Indeed, a failure of the trial court to affirmatively exercise this duty may result in a perversion of the discovery process. The exercise of this fundamental judicial

[footnote continued]

demeanor, as evidenced solely in the course of judicial proceedings undertaken herein, has reflected a lack of impartiality, this Court cannot, consistent with the governing authorities, find these charges "to be of the stuff upon which one can sensibly premise extrajudicial bias." *Id.*, slip op. at 1425. As was the case in the IBM

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function rises to a level of critical significance where, as here, a court is confronted with a multiple party antitrust case wherein the hostile adversaries have demonstrated an abuse of the orderly discovery process and a disdain for a self-imposed cooperative pretrial discovery schedule. As stated by the Supreme Court in *Herbert v. Lando*, ___ U.S. ___, 99 S. Ct. 1635, 1649 (1979):

> The Court has more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials. *Schlagenhauf v. Holder*, 379 U.S. 104, 114-115, 85 S. Ct. 234, 241, 13 L. Ed. 2d 152 (1964); *Hickman v. Taylor*, 329 U.S. 495, 501, 507, 67 S. Ct. 385, 388, 391, 91 L. Ed. 451 (1947). But the discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they "be construed to secure the just, speedy, and *inexpensive* determination of every action." (Emphasis added.) To this end, the requirement of Rule 26(b)(1) that the material sought in discovery be "relevant" should be firmly applied, and the district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." Fed. Rule Civ. Proc. 26(c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.

*See also Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 889 (8th Cir. 1978), wherein the Court of Appeals intimated:

> The district court must be free to use and control pretrial procedure so to insure the orderly administration of justice. *Link v. Wabash R.R.*, 291 F.2d 542, 547 (7th Cir. 1961), *aff'd*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962). In his pretrial role, the district judge must at times assume the active part of "director of litigation * * * [free to] strip

[footnote continued]

litigation, the plaintiff's failure herein to "establish or identify any personal connection, relationship or extra-judicial incident which accounts for the alleged personal animus of the trial judge" renders the City's moving papers legally insufficient to warrant disqualification. *Id.*, slip op. at 1419.

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the controversy of nonessentials, and to mold it into such form as will make it possible to dispose of the contest properly with the least possible waste of time and expense." *Buffington v. Wood*, 351 F.2d 292, 298 (3d Cir. 1965), *quoting from* Committee on Pretrial Procedure to the Judicial Conference of the District of Columbia, *Report*, 4 Fed. Rules Serv. L. R. 47 (1941). The district court's discretionary power to limit discovery and proof at trial extends to complex litigation involving lengthy discovery procedures. *See Aviation Specialties, Inc. v. United Technologies Corp.*, *supra*, 568 F.2d at 1189-90; 1 Pt. 2 *Moore's Federal Practice* ¶ 2.40 (2d ed. 1978) (hereafter Manual for Complex Litigation).

In his concurring opinion, Circuit Judge Lewis of the Tenth Circuit similarly stated in *Paramount Film Distributing Corp. v. Civic Center Theatre*, 333 F.2d 358, 362-63 (10th Cir. 1964):

It is the clear duty of the trial court to control discovery under Rule 34 and a failure or refusal to do so is an abdication of judicial function so patent as to subject the mischief to the extraordinary remedy of appellate writ. But the technique of control is a matter of discretion, skill and judgment lying peculiarly within the trial court's grasp and subject to many variations depending upon the particular case and its problems. Complaints as to technique of control cannot be reached by extraordinary writ. In the case at bar, the trial court granted appellees' motion to produce *in toto* stating that he believed broad discovery was necessary in antitrust cases and that he would not "interfere." Our decision assumes, and I have no doubt, properly so, that the trial court's statement was but a generalization, an indication that the court considered wide latitude initially desirable as a matter of considered judgment. But certain it is that if, as the film companies apprehend, the course of the trial court's order results in a clear frustration of the intended

[footnote continued]

The Sixth Circuit Court of Appeals has consistently recognized the impropriety of predicating disqualification determinations upon the judicial conduct of the trial court. Indeed, the Sixth Circuit in the case of *Oliver v. Michigan State Board of Education*, 508 F.2d 178 (6th

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purpose of discovery by imposing an overwhelming and unjustifiable physical and financial burden upon them, the trial court should then impose careful limitation.

Rule 34, if not properly supervised, can also be used as an instrument of abuse under circumstances not amounting to an abandonment of the judicial function by the court.

*Link v. Wabash R.R. Co.*, 291 F.2d 542, 547 (7th Cir. 1961), *aff'd*, 370 U.S. 629, 83 S. Ct. 1386 (1962), counsels:

Pre-trial procedure has become an integrated part of the judicial process on the trial level. Courts must be free to use it and to control and enforce its operation. Otherwise, the orderly administration of justice will be removed from control of the trial court and placed in the hands of counsel. We do not believe such a course is within the contemplation of the law.

*See also Lewis v. Texaco, Inc.*, 527 F.2d 921, 926 (2d Cir. 1975); *Blum v. Gulf Oil Corporation*, 597 F.2d 936, 938 (5th Cir. 1979); *H. K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976); *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124 (5th Cir. 1976), *reh. denied*, 540 F.2d 1085 (1976); *Wilver v. Fisher*, 387 F.2d 66, 69 (10th Cir. 1967).

It is abundantly clear from the foregoing authorities that this tribunal's conditioning of future discovery upon completion of all outstanding discovery and a showing of need for additional discovery was a reasonable judicial act undertaken pursuant to the Court's well-recognized duty to direct, manage and supervise the discovery process.

While the Court recognizes that the plaintiff's specific factual allegations must for the purposes of this inquiry be taken at face value, it is nonetheless this Court's firm conviction that the City, having consciously elected not to pursue orderly pretrial discovery within the mandates of this trial court, which decrees were designed to bring order from the chaos that was precipitated at an early stage of this litigation by the discovery abuses perpetrated by all parties, cannot now on the eve of trial justifiably complain but must instead accept the natural consequences of its voluntary conduct.

Cir. 1974), *cert. denied,* 421 U.S. 963, 95 S. Ct. 1950 (1975), was confronted with a recusal motion premised upon allegations substantially similar to those advanced herein. The Court of Appeals stated:

> Appellants' affidavit included allegations that the District Judge held "an unshakable conviction" that there is no distinction between de facto and de jure segregation for constitutional purposes; that the relief granted was biased in favor of the black plaintiffs and prejudicial to poor whites; that personal bias for the plaintiffs was demonstrated by the manner in which the parties were characterized and the treatment accorded the parties, counsel, and witnesses; that an irrelevant and erroneous finding was made with regard to certain advice given by the defendants' attorney; that a Motion for Protective Order filed by plaintiffs was given improper treatment; and that there was undue delay in holding the trial on the merits of the case. All these allegations relate to, and are sought to be supported by, proceedings in and the rulings by the District Court.
>
> Treating the facts alleged in the affidavit as true and looking only to the sufficiency of those facts in considering the recusal motion, Berger v. United States, 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 (1921), we find that the allegations do not suffice to support a claim of personal bias or prejudice on the part of the District Judge. As we have stated previously:
>
> The bias or prejudice which will disqualify a judge must be "personal" bias or prejudice as distinguished from a judicial one. . . .

> It is not sufficient if the alleged bias or prejudice arises out of the judge's background and associations rather than his appraisal of the complaining party personally. . . .
>
> Nor is it sufficient that the alleged bias or prejudice arises from the judge's view of the law, which may have been expressed by him in some prior case. . . .
>
> A judge is not disqualified merely because he believes in upholding the law, even though he says so with vehemence. . . .
>
> Adverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice. Knapp v. Kinsey, 232 F.2d 458, 466 (6th Cir. 1956).

*Oliver v. Michigan State Board of Education*, 508 F.2d at 180.

While the disqualification sought in *Oliver* was predicated upon section 144, a Sixth Circuit panel has recently applied the principles of *Oliver* to a recusal appeal premised upon new section 455(a), stating in *Woodruff v. Tomlin*, 593 F.2d 33, 44 (6th Cir. 1979), *reh. en banc granted*, May 24, 1979:

> We find no error in the District Judge's denial of a motion filed by the plaintiffs to require his recusal under 28 U.S.C. § 455(a). Such recusal cannot be based on decisions or rulings of a Judge. *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974), cert. denied, 421 U.S. 963, 95 S. Ct. 1950, 44 L. Ed. 2d 449 (1975).

*Accord: Hepperle v. Johnston, supra*, 590 F.2d at 614; *United States v. Azhocar, supra*, 581 F.2d at 739; *Smith v. Danyo, supra*, 441 F. Supp. at 180.

The foregoing authorities make it abundantly clear that the plaintiff's reliance upon the assertedly disproportionate number of adverse and allegedly erroneous rulings is entirely misplaced.[5] Moreover, the City's

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[5] Similarly unpersuasive is the plaintiff's contention that this Court's extemporaneous characterization of the forthcoming trial as "boring", (see Affidavit of William A. Le Faiver, Esq.) whether viewed separately or in conjunction with the City's other submissions, is legally sufficient to warrant recusal. As aptly stated by the Court in *United States v. Conforte*, *supra*, 457 F. Supp. at 658 n.12:

> The purpose of the extra-judicial source requirement concerns the origin of the judge's bias rather than the place of its expression. . . . [I]f a judge's statements or conduct during a trial refer to or reflect bias or prejudice which arose outside of his judicial duties, then the extra-judicial source rule is satisfied and recusal may be required. Conversely, the fact that a judge has made statements outside the courtroom does not automatically mean that those statements reflect "personal" as opposed to "judicial" opinions, because the origin of the opinion may lie squarely within his judicial experience.

In rejecting an argument similar to the one advanced herein, the Court of Appeals in *United States v. Haldeman*, *supra*, 559 F.2d at 136, concluded:

> Thus, while these thoughts were voiced in an extrajudicial setting—the interview—the informational source upon which they drew—the judge's experience as a judge—was distinctly judicial.

*See also United States v. Board of School Commissioners*, 503 F.2d 68, 80-81 (7th Cir.), *cert. denied*, 421 U.S. 929, 95 S. Ct. 1654 (1974).

Certainly, the judge's extemporaneous characterization of the forthcoming trial as "boring", a term defined in Webster's Third New International Dictionary as "something that is . . . wearisome and tedious . . .", taken within the context of the Court's judicial participation as presiding judge in innumerable other similar protracted, involved antitrust and patent cases which have generated literally thousands of pages of documentary and highly technical evidentiary data, if not accurate, cannot reasonably be interpreted as evidencing either favoritism or the prejudgment of any issue that may arise in this case.

reliance upon the aforesaid affiants' subjective impressions of this tribunal's courtroom demeanor is, without more, *i.e.* the identification of some animus nonjudicial in origin, equally unavailing. While this conclusion necessarily follows from the basic principle that "the bias necessary for recusal must be extrajudicial and not based upon what the judge has learned in [the] case", *In re International Business Machines Corp., supra,* slip op. at 1423, *accord: United States v. Patrick,* 542 F.2d 381, 390 (7th Cir. 1976), *cert. denied,* 434 U.S. 821 (1977), it is also supported by a realistic appraisal of the trial judge's unique role in the judicial process. Judge Frank's observations in *In re J. P. Linahan, Inc.,* 138 F.2d 650, 653-54 (2d Cir. 1943), are instructive:

> But, just because his fact-finding is based on his estimates of the witnesses, of their reliability as reporters of what they saw and heard, it is his duty, while listening to and watching them, to form attitudes towards them. He must do his best to ascertain their motives, their biases, their dominating passions and interests, for only so can he judge of the accuracy of their narrations. He must also shrewdly observe the strategems of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions. [footnotes omitted].

The Court in *United States v. Conforte,* 457 F. Supp. 641, 657 (D. Nev. 1978), has similarly observed:

> The basic rationale of the [extrajudicial source] rule lies in the distinction between the judicial opinions or biases developed by a judge during the course of court proceedings and personal opinions or biases which have their origins in sources outside the courtroom. The former are generally regarded as inevitable and, in fact, as essential to judicial decisionmaking.

Given the trial judge's central role in the administration of the adjudication process, and the underlying obligation of the Court to studiously assess the various participants in a given litigation, it is not surprising that "[o]rdinarily it will not suffice for disqualification that during the course of a case the judge has made remarks critical of a party or his lawyer or that there were other indications of friction." 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3542, p. 352 (1975). As properly stated by the district court in *United States v. Orbiz*, 366 F. Supp. 628, 630 (D. P.R. 1973):

> It is the duty of a judge to arrive at conclusions from manifestations, writings and all other evidence presented in the course of judicial proceedings before him. Critical statements and comments of a judge directed against a moving party, or his counsel or witnesses in the course of proceedings, have been held insufficient to establish disqualifying personal bias or prejudice on the judge's part, whether discreet or indiscreet.

*Accord: United States v. Hall*, 424 F. Supp. 508, 536 (D. Okla. 1975), *aff'd*, 536 F.2d 313 (10th Cir.), *cert. denied*, 429 U.S. 919, 97 S. Ct. 313 (1976). *See In re International Business Machines Corp.*, *supra*; *United States v. Diapulse Corp. of America*, 457 F.2d 25, 30 (2d Cir. 1972); *Sperry Rand Corp. v. Pentronix, Inc.*, *supra*, 403 F. Supp. at 371-72. Absent then a factual

charge that this Court's alleged mistreatment of counsel and witnesses stems from extrajudicial sources rather than the Court's established duty to protect the record from distortions and obfuscations, *see In re International Business Machines Corp., supra,* slip op. at 1424-27; *Bradley v. School Board, supra,* 324 F. Supp. at 449, the instant allegations are clearly insufficient to support a claim of partiality.

In summation, the failure of the plaintiff to advance specific factual allegations of the requisite extrajudicial animus compels the conclusion that the motion at bar is legally insufficient. The Court is also constrained to conclude, for the reasons developed more fully below, that the instant motion must fail for want of timeliness.

In reaching this determination, the Court would observe initially that it finds the plaintiff's contention that no timeliness requirement attaches to the operation of recently enacted section 455 entirely unpersuasive. Indeed, the prevailing weight of legal authority expressly counsels to the contrary. The Second Circuit, for example, recently observed in *In re International Business Machines Corp., supra,* slip op. at 1428-29:

> The court below, as we have indicated, found that the motion to recuse under §§ 144, 455 was not only legally insufficient, but also untimely. Section 144 explicitly requires that the motion must be timely made. While section 455 has no such requirement, we have without explication previously assumed that timeliness was also requisite under the amended statute. *United States v. Daley,* 564 F.2d 645, 651 (2d Cir. 1977), cert. denied, 435 U.S. 933 (1978). But see *SCA Servs., Inc. v. Morgan,* 557 F.2d 110, 117 (7th Cir. 1977). We see no reason why there should not be a timeliness requirement here even without an explicit statutory

> provision. See *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 46 (1913). [footnote omitted].

The court in *Hawaii-Pacific Venture Capital Corp. v. Rothbard, supra,* 437 F. Supp. at 234, has similarly observed that "nothing in the new § 455 abrogates the requirement of § 144 that the motion to disqualify be timely". *See United States v. Patrick, supra,* 542 F.2d at 390. The identical conclusion recently obtained in *United States v. Conforte, supra,* 457 F. Supp. at 654 n.7, wherein the court affirmatively found that the imposition of a timeliness requirement upon new section 455 was compelled both as a matter of statutory construction and by substantial considerations of policy, stating:

> Defendants deny the applicability of the timeliness requirement on the grounds that their motion relies only on section 455, not on section 144, and that section 455 does not include a rule regarding timeliness. *See SCA Services, Inc. v. Morgan,* 557 F.2d 110, 117 (7th Cir. 1977) (Denial of disqualification on procedural grounds of untimeliness, waiver or estoppel is improper where basis for recusal is family relationship under section 455(b)(5)). It is clear, however, that the personal bias and prejudice provisions of the two sections are in pari materia and that the statutes should consequently be construed together. While section 144 sets forth specific procedural safeguards, section 455 is wholly silent about procedure. Thus, it is sensible to use section 144's procedural framework to fill the gap in section 455. To do otherwise would allow any litigant to evade the procedure established in section 144 by simply ignoring that section in favor of section 455. The result would be to effectively repeal section 144 and render it meaningless.

Furthermore, the application of a timeliness requirement with regard to the assertion of claims of personal bias is supported by substantial considerations of policy. The purpose of such a requirement is to prevent litigants from abusing motions to disqualify as dilatory tactics or as means to "sample the temper of the court" before deciding whether to raise an issue of disqualification. *Peckham v. Ronrico Corp.*, 288 F.2d 841, 843 (1st Cir. 1961); *Rademacher v. City of Phoenix*, 442 F. Supp. 27, 29 (D. Ariz. 1977). As stated in a recent case:

> There are strong policy reasons for strictly construing the timeliness requirement. Without such control, a party could speculate on the court's final judgment, withhold information learned before trial, and disqualify the judge if the decision went against him. Further, it is intolerable that a court should so lightly allow the adversary to be put to the other problems of long delays in trying a matter.

*Rousell v. Tidelands Capital Corp.*, 438 F. Supp. 684, 691 (N.D. Ala. 1977).

In passing on the defendant's contention that the instant motion is unseasonably filed, the Court observes preliminarily that a vast majority of the rulings and other judicial incidents upon which the plaintiff's charge of partiality are predicated transpired several years ago. The affidavit of David C. Hjelmfelt, Esq., for example, relates almost entirely to this Court's administration of discovery in the within action during the period July 1, 1975 through March 1, 1976. James vanR. Springer, Esq., attests solely to alleged partiality which was manifested in the course of an evidentiary hearing conducted in June of 1976. The affidavit of James B. Davis, Esq., is essentially a chronology of judicial proceedings

transpiring during the interim commencing with the institution of this action in July, 1975, and concluding in June, 1976. The allegations contained in the affidavit of Jack M. Schulman, Esq., are premised upon judicial proceedings of only a somewhat more recent vintage, having occurred primarily in the Fall of 1977 and the early Spring of 1978. Affiant Holden attests to certain observations undertaken during the period January, 1978 through January, 1979, and the affidavit of Abbott is specifically predicated upon a pretrial hearing of January 27, 1979, over one year ago.

A perusal of the affidavit of William B. Norris, Esq., who currently serves as lead counsel for the City in the instant litigation, is particularly revealing. Norris expressly acknowledges, for instance, that his suspicions regarding this Court's impartiality were initially aroused by this Court's Order of February 17, 1978 (Affidavit ¶ 9). It would appear from his affidavit that, in Norris' judgment, his initial suspicions of February, 1978 were subsequently confirmed by, *inter alia*, this Court's Orders of September 7, 1978 and November 29, 1978.[6] At any rate, Norris affirmatively states that, in his opinion, "Judge Krupansky gave evidence at the January 27, 1979 hearing that his impartiality might reasonably be questioned". (Affidavit ¶ 33).

The plaintiff's moving papers demonstrate with unmistakable clarity that a significant portion of the events underlying the plaintiff's current charge of partiality

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[6]The Court observes parenthetically that the allegations contained in paragraphs 21 through 25 of the Norris affidavit, even if such allegations were true, are predicated upon purely judicial conduct specifically undertaken by this Court pursuant to its inherent authority to direct and supervise the enforcement of its orders and decrees.

transpired at a relatively early stage of this protracted proceeding, and that ensuing incidents in the years 1977, 1978, and early 1979 reinforced the City's impression that this forum lacked impartiality. Indeed, this is reflected in the plaintiff's Memorandum in Support of Motion to Disqualify wherein the City indicates the instant motion is predicated upon "the attitude, demeanor, rulings and other written opinions of Hon. Robert B. Krupansky *during the years that this action has been pending*". *Id.* at p. 2 (emphasis supplied).

Plaintiff seeks to justify the timing of the instant motion, which incidentally, was filed approximately eleven days before the scheduled March 10, 1980 trial date, and only after the City has sought and secured five prior continuances of trial, by its assertion that little if any actual prejudice to the City's right to a fair trial was manifest herein until the recent issuance of this Court's January 15, 1980 and February 19, 1980 Orders. Specifically, the plaintiff states:

> The City was in no position to make a *final determination* of the fact that Judge Krupansky's lack of impartiality would impinge upon the City's right to a fair trial until Judge Krupansky denied the City's collateral estoppel motion in January 1980, and, in February 1980, the City's motion for limited discovery and the City's requested leave to file an amended complaint.

Memorandum in Support of Motion to Disqualify at p. 9. (emphasis supplied).

A review of the applicable authorities discloses that the foregoing proffered justification entirely misconceives the purposes and policies underlying the timeliness requirement. The law is "well settled that one must raise the disqualification of the judge at the earliest moment after knowledge of the facts demonstrating the basis

for such disqualification." *United States v. Patrick, supra,* 542 F.2d at 390. *Accord: Satterfield v. Edenton-Chowan Board of Education,* 530 F.2d 567, 574-75 (4th Cir. 1975); *Duffield v. Charleston Area Medical Center, Inc.,* 503 F.2d 512, 515-16 (4th Cir. 1974); *Marcus v. Director, Office of Workers' Compensation Programs,* 548 F.2d 1044, 1051 (D.C. Cir. 1976); *United States v. Conforte, supra,* 457 F. Supp. at 653. Thus, it is incumbent upon the moving party to act expeditiously upon "notice of potentially disqualifying circumstances". *Andros Compania Maritma v. Marc Rich & Co. A.G.,* 579 F.2d 691, 700 (2d Cir. 1978). As alluded to previously, "[t]he purpose of such a requirement is to prevent litigants from abusing motions to disqualify as dilatory tactics or as a means to 'sample the temper of the court' before deciding whether to raise an issue of disqualification." *United States v. Conforte, supra,* 457 F. Supp. at 654 n.7, *quoting Peckham v. Ronrico Corp.,* 288 F.2d 841, 843 (1st Cir. 1961). As succinctly stated by the Third Circuit Court of Appeals in *Smith v. Danyo, supra,* 585 F.2d at 86:

> The judicial process can hardly tolerate the practice of a litigant with knowledge of circumstances suggesting possible bias or prejudice holding back, while calling upon the court for hopefully favorable ruling, and then seeking recusal when they are not forthcoming. Neither can it tolerate the practice of waiting until the eve of trial and then resorting to a § 144 affidavit in order to obtain an adjournment.

*Accord: Rousell v. Tidelands Capital Corp.,* 438 F. Supp. 684, 691 (N.D. Ala. 1977); *Rademacher v. City of Phoenix,* 442 F. Supp. 27, 29 (D. Ariz. 1977).

The plaintiff's submission of the instant motion under the circumstances prevailing herein manifests an utter

disregard for these sound legal principles. In clear contravention of the policies underlying the timeliness requirement, the City has, through its conduct and indeed by its own admissions, tacit or otherwise, delayed its disqualification challenge until an assertedly "final determination", premised entirely upon the outcome of the Court's rulings of early 1980, was forthcoming. This withholding of the plaintiff's recusal request prevailed in spite of the City's professed knowledge of potentially disqualifying circumstances as early as June, 1976, and thereafter, throughout the ensuing period up to and including January, 1979. This protracted "sampling of the court's temper", undertaken over a period of nearly four years duration, cannot, consistent with the foregoing governing authorities, be condoned. *See also In re International Business Machines Corp., supra,* slip op. at 1428-32. *See generally National Auto Brokers Corp. v. General Motors Corp., supra,* 572 F.2d at 958-59; *United States v. Daley, supra,* 564 F.2d at 651. Moreover, the Court is constrained to observe that the motion at bar, properly assessed in light of the foregoing circumstances, and appraised further in view of the City's repeated resorts to dilatory practices in this proceeding, as recently detailed in this Court's Orders of January 15, 1980 and February 19, 1980, has every appearance of yet another dilatory tactic calculated to further defer ultimate resolution of the instant controversy.

The Court accordingly concludes that the City's motion is both legally insufficient and untimely within the purview of recently enacted 455.[7] The Court's deter-

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[7]During the preparation of this Order, the City has submitted for the Court's perusal a copy of a recent newspaper editorial, which has been denominated as Exhibit 1 to Plaintiff's Reply Brief

[footnote continued]

mination that disqualification is neither warranted nor appropriate under the aforesaid statutory provision is also dispositive of plaintiff's constitutional claim predicated upon the due process clause of the Fifth Amendment. As properly stated by the Second Circuit in *In re International Business Machines Corp., supra,* slip op. at 1428 n.11:

> Because of our determination that recusal is not required under the disqualification statutes, IBM's contention that its due process right to a fair trial was infringed by the Chief Judge's alleged personal bias must also fall. The constitutional fair trial requirement is indeed a "stringent rule", and will bar trial when the appearance of justice is not satisfied as well as in instances of actual bias. *In re Murchison,* 349 U.S. 133, 136 (1955). Moreover, the constitutional right is independent from those conferred by § 144 and § 455, and may well force recusal in instances where the statutes are not technically applicable. See *United States v. Sciuto,* 531 F.2d 843, 845 (7th Cir. 1976); *United States v. Conforte, supra,* 457 F. Supp. at 659. Yet it was to protect this guarantee that the recusal statutes were enacted, Wright, Miller & Cooper, *supra,* § 3541, at 343, and it would be anomalous to hold that a claim under the statutes insufficient on its merits could nevertheless satisfy the constitutional standard. We agree with the District of Columbia Circuit that anything impinging on the constitutional right "would have more readily violated

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in Support of Disqualification. The conclusory and, in the main, factually inaccurate allegations thereof clearly lack the requisite particularity necessary to merit judicial consideration. *See infra.* More fundamentally, the exhibit does nothing to obviate the shortcomings hereinbefore determined to be fatal to the instant motion, namely, the absence of identified or demonstrated extra-judicial animus, and secondly, want of timeliness.

§ 144 and § 455." *United States v. Haldeman, supra,* 559 F.2d at 130 n.276; see *United States v. Conforte,* 457 F. Supp. at 659 n.13. Accordingly, our rejection of IBM's substantive claim of bias under these sections *a fortiori* defeats its due process allegation.

To briefly reiterate, the plaintiff's allegations, examined individually or collectively, neither identify or demonstrate any personal or extrajudicial bias or prejudice on the part of this tribunal. Judge Sirica's evaluation of the defendants' motion for disqualification in *United States v. Mitchell,* 377 F. Supp. 1312, 1323 (D.D.C. 1974), *aff'd sub nom. United States v. Haldeman, supra,* is equally applicable here: "[Plaintiff's] best effort consists of alleging a battery of facts from which it is hoped one [w]ould infer some bias favorable to the [defendant]. Even, then, however, [plaintiff has] cited nothing to suggest that any such bias, which the court assures them does not exist, is personal." As previously indicated, the City's untimely allegations are predicated entirely upon "judicial actions taken within the four corners of the courtroom in the course of this proceeding." *United States v. International Business Machines Corp.,* 475 F. Supp. 1372, 1390 (S.D.N.Y. 1979), *aff'd, In re International Business Machines Corp., supra.* Those judicial actions, whether ultimately upheld on appellate review or not, afford no legally sufficient support for the plaintiff's unseasonable motion is made abundantly clear by the authorities hereinbefore set forth.

This case was assigned to this tribunal not by choice but by the random selection system. It is but one of the hundreds of cases so assigned to this Court each year for judicial administration to disposition. As is every case

assigned to this Court, the instant action has been diligently, attentively and industriously administered with a view toward providing the parties a fair, impartial and speedy trial. Paraphrasing Chief Judge Edelstein in the IBM litigation, this Court has no interest in the ultimate outcome of this case other than the interest of every judicial officer that the truth be discovered and the law correctly applied. The City identifies no personal prejudice and bias on the part of this Court because none exists. *United States v. International Business Machines Corp., supra,* 475 F. Supp. at 1391. To favorably entertain the City's motion would, under the facts and circumstances presented, constitute an entirely unwarranted abdication of judicial responsibility, and, in the considered opinion of this tribunal, delay ultimate resolution of this cause for an additional two to four years.

Accordingly, the City's request that this Court disqualify itself pursuant to 28 U.S.C. § 455 and the Fifth Amendment to the United States Constitution is hereby denied. The Order staying the proceeding of this cause issued on February 29, 1980, shall be terminated as of March 19, 1980, and the trial of this matter shall proceed promptly on March 24, 1980, at 9:15 a.m.

IT IS SO ORDERED.

/s/ Robert B. Krupansky
United States District Judge